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Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

JENNIFER K. HARBURY,
Petitioner,

v.

MICHAEL V. HAYDEN, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

A. Does the application of the political question doctrine to cases involving rogue United States officials who circumvent instead of implement express executive foreign affairs policies, conflict with the jurisprudence of all other federal courts, including the United States Supreme Court?

B. Does the ruling of the United States Court of Appeals for the District of Columbia conflict with District of Columbia jurisprudence by extending the scope of employment to include seriously criminal actions which 1.) do not occur during face to face confrontations, and 2.) do not arise from employment duties which by their nature could foreseeably lead to the use of excessive force?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Petitioner:

Jennifer K. Harbury

Respondents:

United States of America, and Michael Hayden, Director of the CIA

CIA Officials:

1. R. James Woolsey
2. Robert Gates
3. David Cohen
4. Jack Devine
5. Hugh E. Price
6. Thomas Twetton
7. John Gannon
8. Douglas MacEachin
9. John L. Helgerson
10. Terry Ward
11. Brian Latelle
12. Richard Cooper
13. Christine Williams
14. Joseph S. Nye
15. Fritz Esmarth
16. Dan Donahue
17. Fredric Brugger
18. Unnamed CIA officials

U.S. Department of State Officials:

19. Marilyn MacAffee

20. Alexander Watson
21. Peg Willingham
22. Anne Patterson
23. Unnamed officials of the U.S. Department of State

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I. OPINIONS BELOW

The case was dismissed in *Harbury v. Hayden*, 444 F. Supp. 2d. 19(D.D.C. 2006). The Court of Appeals affirmed the District Court decision on April 15, 2008. *Harbury v. Hayden*, 522 F. 3d 413 (D.C. Cir. 2008).

II. STATEMENT OF JURISDICTION

The Judgment and Order of the United States Court of Appeals for the District of Columbia Circuit in this case were entered on April 15, 2008. Petitioner did not seek a rehearing or hearing en banc.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

III. STATUTORY PROVISIONS INVOLVED

This case involves the proper interpretation of the Federal Employees Liability Reform Act, ("Westfall Act"), 28 U.S.C. §2679, Pub. L. No.100-694, 102 Stat. 4563 (1988), (text set forth in Appendix). It also involves the proper application of the political question doctrine.

IV. STATEMENT OF THE CASE

Basis of Jurisdiction: The jurisdiction of the district court was invoked under 28 U.S.C. 1331, (general federal question jurisdiction.)

Statement of Facts[1]:

This case began on March 12, 1992 with the capture of Efrain Bamaca Velasquez by the Guatemalan military. Mr. Bamaca was Mayan citizen of Guatemala, and one of the highest-ranking officers of the Mayan resistance forces in his homeland.[2] The historical context of the ensuing events is key to an accurate analysis of the legal questions presented.

For more than thirty years, the people of Guatemala had endured a tragic civil war and the ravages of a fierce army counter-insurgency campaign. The extent and severity of the official repression had become notorious in the international community. By the time the final peace accords were signed in 1996, some 200,000 civilians had been either murdered or "disappeared", and 660 Mayan villages massacred. The United Nations Truth Commission later charged the government with genocide against its Mayan citizens and held it responsible for 93% of the war crimes that occurred.

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[1] The factual allegations relevant to the jurisdictional issues in this case were presented to the district court in four key documents: 1.) Plaintiff's Second Amended Complaint, 2.) Plaintiff's Further Submission of Factual Allegations, ("Plaintiff's Further Submissions") of 8/06/1998, 3.) Plaintiff's Presentation of Requested Supplementary Evidence, ("Plaintiff's Presentation") of 12/11/2003 and 4.) Plaintiff's Reply of 6/22/2004. These documents were set forth in Appellant's Joint Appendix to the Court below.

[2] The predominantly Mayan resistance forces composed the Unidad Revolucionaria Nacional Guatemalteco, or "URNG" (Guatemalan National Revolutionary Union).

The report also stated that the army's use of torture and terror was routine and systematic.[3]

The United States itself was never at war in Guatemala, nor were its troops engaged in combat activities there.[4] For many years, however, the U.S. government did provide extensive military funding, training, and equipment, and U.S. intelligence advisors worked all too closely with the army.[5] This relationship changed as the carnage continued. In 1990 the U.S. halted military aid to Guatemala in response to the rampant government human rights violations.[6] President Clinton, during his administration, made the advancement of the ongoing peace process and the promotion of human rights the top priorities of his foreign affairs policies towards Guatemala.[7] The CIA itself issued a number of directives forbidding the involvement of its agents in acts of torture. [8] These new policies displeased

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[3] *Memoria de Silencio*, (Memory of Silence), CEGH, 1999, cited in Plaintiff's Presentation, (J.A. p.144) and Plaintiff's Reply, (J.A. p.187). (4% of the responsibility was assigned to the URNG forces).

[4] Plaintiff's Presentation, (J.A. pp.145, 178-179) and Plaintiff's Reply (J.A. p. 186).

[5] See generally, Appellant's Final Brief, pp. 7-8, and accompanying citations to the record.

[6] Plaintiff's Further Submission, (Tabs 3, 12) and (J.A. p. 74).

[7] Plaintiff's Presentation, (J.A. pp. 178-179) and Plaintiff's Reply (J.A. 186). Respondents have never challenged this nature of this policy, nor urged that they ever received different orders or instructions from the White House.

[8] Plaintiff's Presentation, (J.A. pp. 176-178).

many of the respondent officials, who, as discussed below, chose to defy them.[9]

It was in this context that Mr. Bamaca vanished during a brief skirmish in southwestern Guatemala.[10] He was captured alive by government troops and turned over to a team of high-level intelligence (G-2) officers, including Col. Julio Roberto Alpirez. The team immediately recognized Mr. Bamaca's extraordinary value as a source of military information. To force him to divulge that information, they decided to subject him to long-term torture, under the supervision of military physicians to prevent his accidental death. The goal was to break him psychologically, not to kill him outright. To evade international outcry, they falsely reported that Mr. Bamaca had died in combat. His existence as a prisoner was kept top secret even from other military officers.[11]

The CIA Respondents, however, were promptly informed. As later disclosed, many of the G-2 officers in question, including Alpirez, were paid CIA informants, or "assets". Despite the ban on military aid, the CIA was still channeling enormous payments to these informants, a source of funding

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[9] As later stated by some officials, the CIA station in Guatemala was out of control. Plaintiff's Further Submission, (Tab.11).

[10] Ironically, he had been assisting his colleagues to prepare for the next issue on the negotiations agenda, Indigenous Rights, shortly before his capture.

[11] See generally, Plaintiff's Second Amended Complaint.

the Guatemalan army considered "vital".[12] Thus within a week, the G-2 team had fully informed the CIA Respondents of Mr. Bamaca's plight. In turn, the CIA agents immediately circulated a memo to the Department of State Respondents, reporting Mr. Bamaca's capture and noting that the army was falsely reporting his death in order to torture him for his information.[13]

All Respondents were fully aware of the Guatemalan army's "reprehensible" human rights record, and the fact that all prisoners of war were routinely tortured and extra-judicially executed.[14] The CIA Respondents were also aware of Col. Alpirez' frightening record of abuse.[15] Nevertheless they continuously requested additional information about Mr. Bamaca, and made handsome payments to their assets therefore,[16] for the next three years. Respondents knew and intended that the information would be contemporaneously extracted from Mr. Bamaca through torture and would end

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[12] Plaintiff's Further Submission, (Tab 2, Intelligence Oversight Board Report, p.20, Tab.3).

[13] Plaintiff's Further Submission, (J.A. p. 75).

[14] Plaintiff's Further Submission, (Tab 2 at p. 20, Tab 6, and Tab 7) (routine torture and execution of prisoners of war; army holding of prisoners in deep water pits, then throwing them from helicopters dead or alive after interrogation sessions).

[15] CIA records describe Alpirez as a dangerous and violent man, deeply implicated in the campaign of genocide in Mayan highlands, and responsible for the murder of U.S. innkeeper Michael Devine. Plaintiff's Reply, (J.A. p.185), Plaintiff's Further Submission, Tab 5, and J.A. pp. 71, 73-74).

[16] Col. Alpirez, after a particularly grim torture session with Mr. Bamaca, received $44,000 from the CIA. Plaintiff's Further Submission, (Tabs 1A and 3).

with his extra-judicial execution. They also knew and intended that the promise of such handsome payments would in fact provoke further torture. Yet they made no attempt to control their own assets, withhold payments, or require their compliance with international law.[17] Nor did they report Mr. Bamaca's fate to any law enforcement agents, or to the courts of law.

The CIA Respondents did, however, promptly share all incoming bulletins about Mr. Bamaca with the U.S. Department of State during this period. Like their CIA colleagues, the State Department Respondents acted to shield the torturers, as set forth below. Voluminous information about Mr. Bamaca was received by all Respondents from March 1992 until Mr. Bamaca's assassination in 1994. The reports included the identities of his captors, descriptions of his ongoing torture, and confirmation that some 350 other secret prisoners were in army custody.[18]

Petitioner Jennifer Harbury, Mr. Bamaca's wife, at first believed the army reports that her husband had died in combat. She learned of his true plight in late 1992, when a young prisoner escaped and informed her that he was alive and suffering terrible torture. She immediately approached the State Department Respondents, who falsely told her

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[17] In fact the Guatemalan military considered the continuation of CIA funding to be "vital" and was very concerned about its potential termination due to human rights violations. Plaintiff's Further Submission, (Tab 2, p.20).

[18] Plaintiff's Further Submission, (Tabs 18, 34).

they had no information about her husband. She also sought the assistance of the U.S. Congress, and the international human rights community. The CIA and State Respondents assured all inquiring officials, including concerned members of Congress, that there was no information about Mr. Bamaca. Such false statements were given in order to shield the Guatemalan military from any legal, economic, or diplomatic sanctions.

Ms. Harbury then engaged in a three-year battle to save her husband's life, including three highly dangerous hunger strikes, two of them in Guatemala. Throughout this period, the CIA and State Department Respondents continued to obtain bulletins about the ongoing torture of Mr. Bamaca and the other secret prisoners. During this period, many of these prisoners, including Mr. Bamaca, could have been rescued. [19]

Nevertheless, both the CIA and the State Department Respondents continued to falsely and repeatedly tell Ms. Harbury, concerned Congresspersons, and other officials that there was no information about Mr. Bamaca, or any clandestine prisons in Guatemala. In short, the Respondents blocked his rescue.

In April 1995, U.S. officials confirmed that Mr. Bamaca had been executed without trial upon the orders of Colonel Alpirez. The other secret

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[19] See generally, Plaintiff's Second Amended Complaint.

prisoners were dead as well. Had the truth been timely revealed, these lives could have been saved.[20]

As stated above, the official U.S. foreign policy during this period was the advancement of the peace accords and the promotion of human rights in Guatemala. The war activities were dwindling to an end. Several sections of the accords, including the human rights accord, had already been signed and were in effect. The United States faced no security risks.[21]

The State Department and CIA Respondents nevertheless chose to defy their new orders, and strive instead to carry out their personal political objectives. Rather than implementing the President's clear policies they chose to support and shield the ongoing secret detention, torture, and assassination of a high ranking URNG commander.

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[20] Declassified documents, together with witness statements, shed partial but grim light on Mr. Bamaca's fate. It is known that he was constantly battered and drugged, that he was injected with a toxic substance that caused such immense bodily swelling that one arm and leg hemorrhaged, that he was placed in a full body cast to prevent his escape, and that he was then either dismembered or thrown from a helicopter. See Plaintiff's Further Submission, (Tabs 1A, 17, 20, 21, 22) for example. The rest of his ordeal remains concealed, although routine army treatment of all prisoners included the extraction of fingernails, genital mutilation, severe burns and electrical shocks, drownings, and multiple amputations. See U.N. Truth Commission Report, Memoria de Silencio, supra, throughout.

[21] Plaintiff's Presentation, (J.A. pp. 145,178-179); Plaintiff's Reply, (J.A. p. 186).

[22] This occurred while the United States and other friendly nations were brokering the peace negotiations and pressing for mutual trust and cooperation between the government forces and the URNG.[23]

In the aftermath of the official disclosures about Mr. Bamaca's death, scandal swirled in both Washington as well as abroad. Key members of Congress demanded explanations.[24] President Clinton ordered an in–depth investigation.[25] The CIA, claiming a few bad apples, reprimanded and/or discharged a number of the involved Respondents.[26] After the 1998 publication of the U.N. Truth Commission report, which criticized the CIA's complicity in the repression, President Clinton issued a formal apology to the people of Guatemala.[27]

Procedural History: The Petitioner filed suit in 1996 in the United States District Court, District of Columbia, claiming violations of the United States

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[22] Plaintiff's Further Submission, (Tabs 2, pp. 20, 33-34, Tab 4, Tab 11, J.A. pp. 69-75,79-80) (the CIA viewed the Guatemalan security forces as their partners despite egregious violations, and the station had lost its objectivity in the Bamaca case. The station was "out of control" in Guatemala.).

[23] Plaintiff's Presentation,(J.A. 179).

[24] See, for example, Plaintiff's Further Submission, (Tabs 11, 14).

[25] Intelligence Oversight Board, "Report on the Guatemala Review", June 28, 1996.

[26] Plaintiff's Further Submission, (Tabs 24-25).

[27] Plaintiff's Presentation,(J.A. 149).

constitution, the Alien Tort Claims Act[28], ("ATS"), the Torture Victim Protection Act[29], ("TVPA"), and a number of common law torts. The constitutional claims were dismissed in *Harbury v. Deutch*, 1999 U.S. District LEXIS 22414 (D.D.C. March 22 1999), *aff'd in part, rev'd in part*, 233 F.3d 596 (2000), *reh. denied* 244 F.3d 956 (2001), *reh. en banc den.* 244 F.3d 960 (2001), reversed and remanded *Christopher v. Harbury*, 536 U.S. 403 (2002). In 2000, the U.S. Attorney General certified that the Respondents' actions fell within the scope of their employment, bringing such acts within the Federal Tort Claims Act,("F.T.C.A.") and its exceptions. The district court rejected Defendants' subsequent political question arguments, and permitted Plaintiff's TVPA and ATS claims to continue, as well as several of the FTCA claims.[30] In 2006 all claims were dismissed pursuant to *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004). *Harbury v. Hayden*, 444 F. Supp. 2d. 19 (D.D.C. 2006). The Court of Appeals affirmed the dismissal, basing its decision on the political question doctrine, and the applicability of the Westfall Act. *Harbury v. Hayden*, 522 F. 3d 413(D.C. Circuit 2008).

V. ARGUMENT

The Petition for Certiorari should be granted in this case because the decision of the U.S. Court of Appeals for the District of Columbia is in conflict with all courts with respect to the political question

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[28] 28 U.S.C. 1350.

[29] 28 U.S.C.1350n., Pub. L. No. 102-256, 106 Stat. 73 (1992).

[30] See Opinion of March 13, 2001, Appendix.

doctrine, and with well-settled District of Columbia jurisprudence on scope of employment standards. Moreover, this case requires review because of the unique importance of the issue raised. Specifically, may United States officials be granted full immunity for the crime of torture, the most abhorrent of all government actions?

A. Political Question Doctrine:

The Court of Appeals in this case has dangerously expanded the political question doctrine by holding it applicable to *ultra vires* actions. Clearly the Respondents' rogue actions in this case did not represent official U.S. policy. To the contrary, they were intended to subvert and displace the stated foreign policy goals of the President of the United States. Worse yet, they were in full defiance of their own agency's orders and regulations. By shielding such acts from judicial review, the decision in the case at bar breaks with long-standing jurisprudence. More disturbingly, the ruling leaves the highest executive decision-making process vulnerable to interference by unqualified subordinates. The precedent set erodes the very purpose of the political question doctrine.

The appellate court began its analysis by setting forth the well settled criterion articulated in *Baker v. Carr*, 369 U.S. 186 (1962). The Court then cited *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D. C. Cir. 2006), and *Bancoult v. McNamara*, 445 F.3d

427, (D.C. Cir. 2006) and ruled the doctrine applicable.

Petitioner in no way challenges the actual foreign affairs policies of President Clinton with regards to Guatemala, and was in fact in agreement with his humanitarian priorities. Rather, she challenges the obstruction of those policies by the Respondents. For the reasons discussed below, the appellate court's analysis in this case was erroneous.

Although the political question doctrine remains complex in its day-to day application by the courts, certain well-developed principles guide the analysis. To begin with, the doctrine is sparingly applied, *Doe v. Bush*, 323 F.3d 133, 140 (1st Cir. 2003), and the courts will strive to protect key individual rights. For example, military decisions may be reviewed if a constitutional violation is alleged. See, e.g., *Custer v. Garvey*, 256 F. 3d 1024, 1030-1031(10th Cir. 2001), *Clark v. Widnall*, 51 F.3 917 (10thCir. 1995)(constitutional challenge not precluded).

Moreover, while matters of foreign affairs or other political issues are frequently deemed inappropriate for judicial scrutiny, the mere fact that political affairs are tangentially implicated will not render the case injusticiable. See, *Bancoult*, at 435, citing *Baker*, at 211, *Kadic v.Karadzic*, 70 F. 3d 232, 249 (2d Cir. 1995). See also, *Nixon v. Herndon*, 273 U.S. 536, 540 (1927.) The core judicial concern is to preserve the separation of powers. *Baker v. Carr*, 369 U.S. 186 (1962).

Until now, no federal court has ever permitted rogue agents to evade judicial scrutiny by invoking the political question doctrine. By their nature such actions do not represent official policies, and hence merit no protection.[31] This self-evident principle was recognized in *Gonzalez-Vera*, at 1264. (Rogue officers acting in a manner removed from their official duties do not represent official U.S. policy, and the political question doctrine would not apply). See also, *Arar v. Ashcroft*, 414 F. Supp. 2d. 250, 265(E.D.N.Y.2006).

Likewise, it is presumed that formal agency regulations and guidelines represent true official policies. Thus an officer's failure to comply with such regulations is properly reviewed. *Stehney v. Perry*, 101 F.3d 925, 932-933 (3d Cir. 1996), citing *Service v. Dulles,* 354 U.S. (1957) and *Accardi v. Shaughnessy* 347 U.S. 260 (1954); *Custer v. Garvey*, 256 F. 3d 1024, 1030-1031(10th Cir. 2001), *Mindes v. Seaman*, 453 F. 2d 197,200 (5th Cir. 1971), and *Penagaricano v. Llenza,* 747 F.2d 55, 60 (1st Cir. 1984).

Because separation of powers is the lynchpin of the political question doctrine, the courts will also review actions that exceed the official's proper scope of authority. As stated in *Baker v. Carr,* 369 U.S. 186, 211 (1962):

> "Deciding ....whether the action of that branch exceeds whatever authority has been

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[31] As stated by U.S. Rep. Fascell, "There is no such thing as official torture." 130 Cong. Rec. 24,859(1984).

committed... is a responsibility of this Court as ultimate interpreter of the Constitution."

See also, *Clark v. Widnall*, 51 F.3d 917, 921 (10th Cir. 1995), *Custer*, supra, *Puzz v. U.S. Department of the Interior, BIA,* 1984 U.S. Dist. LEXIS 23096, (N.D. Ca. 1984).

The appellate court's reliance on *Schneider, Gonzalez-Vera* and *Bancoult, supra,* is thus misplaced. All three rulings differ from the case at bar in one crucial aspect: the officials in question were clearly following and/or implementing *actual* executive policies. In *Schneider* and *Gonzalez-Vera*, for example, Mr. Kissinger had received direct orders from President Nixon himself. In *Bancoult,* the officials were implementing a formally approved British-American agreement to build a military base on the island of Diego Garcia. In none of these cases were the defendant officials seeking to contravene any Presidential or Congressional policy decisions.

Review in this case is proper, both because the Respondents contravened express executive policy decisions, and violated agency orders.

Moreover, in this case the Respondents' participation in torture and extra-judicial execution was clearly in excess of their statutory authority and hence constituted *ultra vires* action. The CIA was established in 1947, and its powers were set forth in the National Security Act, ch. 343, 61 Stat. 495 (1947)(codified as 50 U.S.C. §§ 401-405). Although the Act authorized the collection of intelligence

through lawful methods, there is no language suggesting that the use of such extraordinary methods as torture or assassinations might be permissible. Nor may the intent to authorize such judicially and congressionally abhorred methods simply be presumed here. *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 22 (1963)(with regards to important issues, affirmative intent of Congress must be clearly expressed).

Indeed, legislative intent to the contrary is made clear by the historical context. The Central Intelligence Agency was established while the horrors of World War II were fresh in the minds of the public and legislature. The United States was preparing to negotiate the Geneva Conventions. The Nuremberg trials were imminent. General Yamashita of Japan had already been convicted by a U.S. tribunal of war crimes, including the torture of American prisoners of war. *In Re Yamashita*, 327 U.S. 1 (1945). It cannot reasonably be presumed that Congress intended to authorize the very acts it was at that very moment seeking to abolish forever.

An agency, moreover, cannot unilaterally expand its own powers. Such expansion in and of itself violates the separation of powers principles. The agency is limited to those powers delegated by Congress.

The Appellate Court erred by applying the political question doctrine to a case involving acts by rogue agents that defied the President's foreign affairs decisions as well as their own agency's orders

and instructions. It further erred in applying the doctrine to actions taken in excess of congressionally delegated authority.

Applying the *Baker v. Carr* standards to these realities sheds light on the dangers inherent in the appellate court's ruling:

1. Constitutional Commitment to Other Branch: Petitioner agrees that foreign policy determinations fall within the exclusive powers of the executive branch. Here, she challenges the Respondents' unlawful obstruction of those policies. By applying the political question doctrine, the lower courts have weakened the very executive decisions the doctrine seeks to protect.

2. Judicially Manageable Standards: The courts in this case need only determine whether the Respondents' *ultra vires* actions were also unlawful. If so, the jurisprudence for common law torts is clear and well settled, as are the standards for adjudicating claims of torture under the ATS and TVPA.

3. Initial Policy Determination: Again, the courts are not asked to evaluate the President's foreign policies. They are only asked to adjudicate the Respondents' unlawful circumvention of that policy. The appellate ruling encourages further interference by discontented subordinates, and sets a dangerous precedent.[32]

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[32] At no time in this litigation have Respondents argued that other secret policies or authorizations were in place.

4. Respect for Coordinate Branches: By protecting the official policy decisions of the President from outside obstruction and manipulation, the courts would be supporting and respecting the coordinate branches.

5. Unusual Need for Adherence to Decisions: By withholding the protections of the political question doctrine from rogue officers, the courts would be enforcing adherence to and respect for key political decisions. The appellate decision permits and encourages deviation.

6. Multifarious Pronouncements: The actions of the Respondents did result in multifarious, contradictory and embarrassing pronouncements of U.S. foreign policy. The President himself was pressing for peace and human rights. Respondents were simultaneously collaborating in the prolonged torture of Mr. Bamaca, a leader of a participating organization in the peace negotiations. The international reaction was indeed embarrassing.

B. Westfall Act and Scope of Employment:

The Court of Appeals ruled, in the alternative, that the Respondents were acting within the scope of their employment, thus triggering the application of the Westfall Act[33]. The case was then dismissed under the foreign headquarters exception to the

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[33] Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. 2679, Pub. L. No. 100-694, 102 Stat.4563 (1988).

Federal Tort Claims Act [34]pursuant to *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The appellate decision is in direct conflict with the jurisprudence of the District of Columbia. Although the courts there have ruled that certain criminal actions may fall within the scope of employment, those cases have been strictly limited to a set of well-defined conditions. Such conditions are notably absent here.

As stated in *Majano v. United States*, 469 F.3d 138 (D.C. Cir. 2006), the applicable standards for determining scope of employment issues are governed by the Restatement (Second) of Agency. The Restatement at § 228, in turn, sets forth four basic criterion: 1.) the act must be of the kind the defendant was employed to perform, 2.) the conduct must have occurred within the authorized time and space limits, 3.) the conduct must have been actuated, at least in part, by intent to serve the master, and 4.) the intentional use of force must not have been unexpected.

These four criteria were further explained and elaborated in the Restatement, supra, at § 229. As made clear in that section, seriously criminal actions are deemed to be "unexpected" and hence beyond the scope of employment. The illustration provided is that of a gardener seeking to keep children away from the flowerbeds. If he merely throws stick to frighten them, he would be acting within the scope of

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[34] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, Pub.L. No. 79-601, Title IV, 60 Stat. 812, 842-47(1946).

his employment. However, if he shoots the children, then his actions cannot be deemed foreseeable and exceed the scope of his employment. This limitation forms a key part of District of Columbia jurisprudence, as discussed below.

Torture and extra-judicial execution are, of course, the most serious of all crimes. However, the appellate court below relied heavily on two now-marginal rulings by the courts: *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) and *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986). Although both cases involved serious crimes, this reliance is misplaced.

In *Penn Central Transportation Co. v. Reddick, 398 A.2d 27,31 (D.C. 1978),* the court wrote that an employer would be held liable in cases involving egregious or unlawful actions if the nature of the employment itself provided a "peculiar opportunity and... incentive for such loss of temper" (citing W. Prosser, Law of Torts § 70, (4th Edition 1971). In such instances, the violent or seriously criminal act could be foreseeable. This principle was applied in *Hechinger v. Johnson* 761 A.2d 15 (D.C. 2000)(apprehension of a customer by a store security guard), *District of Columbia v. Minor*, 740 A.2d 523 (D.C. 1999)(police arrest). See also *Jordan v. Medley*, 711 F.2d 211 (D.C. Cir. 1983)(rent collection). In short, if the nature of the duties themselves create conditions which could foreseeably give rise to the equivalent to "heat of passion" crimes, then such resulting acts might fall within the scope of employment.

The rulings in both *Lyon and Weinberg, supra,* are rooted in this principle. The *Lyon* case involved a defendant hired to deliver goods in person at the customer's home, and to collect immediate payment there. *Weinberg* involved a defendant charged with the in-person resolution of customer disputes. In these and other similar cases, the courts found that the type of employment in question could give rise to flaring tempers, and that the scope of employment issue was hence a matter for jury determination.

Significantly, this expanded version of foreseeability has never been applied to torts that did not occur under face-to-face and/or exigent circumstances. "Heat of the moment" crimes are not committed from a remote location or after leisurely reflection.

The District of Columbia courts, in virtually all other cases, have refused to find that seriously criminal actions fall within the scope of employment. Indeed, such outrageous acts are held to reflect purely personal motivation. As noted in *Jordan*, at 214, a bank teller who shoots a bank examiner to protect the bank, will never be deemed to have acted within the scope of his employment. See also *Penn*, at 31, "When a servant's conduct is unprovoked, highly unusual and outrageous, these facts alone may ...indicate that the motive...was personal". Such actions are considered personal adventures. *Guzel v. State of Kuwait*, 818 F. Supp. 6 (D.D.C. 1993), *Boykin v. District of Columbia*, 484 A. 2d. 560 (D.C. App. 1984), *International Distributing Corp. v. American District Telegraph Co.*, 569 F.2d. 136 (D.C.

Cir. 1977), *Majano v. United States*, 469 F. 3d 138 (D.C. Cir. 2006), *District of Columbia v. Coron*, 515 A. 2d 435 (D.D.C. 1986)(whether or not defendant was on duty is irrelevant.)

In short, even if a criminal act may in some employment contexts be foreseeable, if sufficiently egregious it will still fall beyond the scope of employment. By way of illustration, a police officer carrying out a difficult arrest may be expected to occasionally exceed the necessary use of force. However, should that officer sit on the suspect's chest and methodically pull out his fingernails, the scope of employment clearly would be abandoned. *Jordan*, supra.

The courts have, moreover, retreated from the extreme rulings in *Lyon* and *Weinberg*. See, *Haddon v. U.S.A.* 68 F.3d 1420, 1425 (D.C. Cir. 1995). The correct analysis of current scope of employment questions arising under District of Columbia law is embodied in *Majano v. United States*, supra. In that case, the Plaintiff was required to check identification cards at the Smithsonian museum. This task resulted in a violent assault by an offended co-employee. The court ruled that the attack was a personal adventure, even though it might have been motivated by Defendant's desire to promptly arrive at work.

In short, District of Columbia jurisprudence continues to adhere to Restatement with regards to the scope of employment standards. The sole expansion of these standards applies to highly

limited circumstances. Specifically, it applies to jobs that, by their nature, create face-to-face situations in which tempers might flare, or the authorized use of force might easily get out of hand.

The case at bar presents no such situation. The Respondents were not at war or engaged in combat activities. There were no exigent circumstances or "ticking bomb" to create unusual levels of stress or rage. No U.S. personnel were at risks. The signing of the final peace accords was imminent.

More importantly, Respondents were not engaged in any face-to-face interrogation sessions with Mr. Bamaca. Nor did they need to subdue him. He was already disarmed, battered and encased in a full body cast. The Respondents were sitting far away in comfortable air- conditioned offices, making plans and decisions at their leisure over a three-year period of time. This case presents no momentary flare of temper or special circumstances.

In short, there are no facts to bring this case within the District of Columbia's forseeability test. The extraordinary nature of the crime of torture, moreover, places it squarely within the personal adventure rulings.

The appellate decision is in direct conflict with the District's jurisprudence here. The precedent places the D.C. case law at odds with its own roots, specifically, the requirements of the Restatement. Worse yet, it forces that case law into a head-on

collision with the legislative intent behind both the F.T.C.A. and the Westfall Act, by protecting official acts of corruption and the abuse of power.

C. Historical Context of the Westfall Act:

The appellate decision in this case gives rise to grave concerns. It not only creates an artificial conflict between the F.T.C.A. and District of Columbia jurisprudence; it also creates hitherto non-existent immunities for acts of torture, the most judicially abhorred of all official abuses of power.

Historically, sovereign immunity did not apply to the torts of federal employees, even if they were acting in good faith and within the scope of their employment. *Little v. Barreme*, 6 U.S. 170 (1804), *Developments in the Law—Remedies Against the United States and its Officials*, 70 Harv. L. Rev. 829(1956-1957). United States postal workers, for example, routinely faced litigation and potential personal liability for traffic accidents occurring while they delivered the mail.[35]

Both the courts of law and the United States Congress took action to balance the victim's need for compensation with the government employee's need for reasonable protection. The courts extended the judicially crafted doctrine of official immunity to federal employees acting within the scope of their authority, and carrying out discretionary, as opposed

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[35] January 9, 1961 Letter of Mr. Franklin Floete, GSA Administrator, to U.S. Rep. Sam Rayburn, Senate Report No. 736, 1961 U.S.C.C.A.N. p. 2784 at 2791.

to ministerial, duties.[36] *Barr v. Matteo,* 360 U.S. 564, (1966), *Westfall v. Erwin,* 484 U.S. 292 (1988). Officials acting beyond the scope of their authority, or in violation of the constitution, received only qualified immunity, which in turn depended on a finding of good faith. *Butz v. Economou,* 438 U.S. 478 (1978), *Bivens v. 6 Unknown Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339 (2d Cir. 1971). In short, a federal employee who knowingly exceeded or abused his or her powers received no protection.

Meanwhile, Congress also acted to ameliorate the situation. In 1946 legislators passed the Federal Tort Claims Act, supra, waiving sovereign immunity to permit suits against the United States for torts committed by federal employees acting within the scope of their employment. Initially, the plaintiff could seek compensation from either the government employee *or* the United States[37], although, of course, not from both. Moreover, certain exceptions applied if the United States were sued; such as the exception for intentional torts. Thus a federal employee involved, in good faith, in a case of ordinary negligence could assume that the plaintiff would bring suit against the United States, and recover from the U.S. treasury. However, an employee carrying out a malicious assault faced personal liability alone. In short, like the courts of law, Congress refused to shield those who exceeded or abused their powers.

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[36] Significantly, police actions were deemed ministerial, and the use of excessive force or unlawful search and seizures remained unprotected. *Bivens*, supra, at 1346.

[37] See footnote 28, above.

After the Supreme Court ruling in *Westfall v. Erwin,* supra, members of the 100th Congress became highly concerned with the plight of lower level employees engaged in ministerial duties. Such employees, as noted above, had no protection for their good faith efforts to carry out their official tasks. In passing the Westfall Act, supra, in 1988 Congress sought to extend reasonable protections to this class of government workers as well, but otherwise not to change existing law. Indeed, as noted by the House Committee on the Judiciary, the goal was to preserve the status quo.[38]

With the passage of the Westfall Act, suit under the F.T.C.A. became the exclusive remedy for any torts committed by a federal employee acting within the scope of his or her employment. If the tort fell within a statutory exception, the Plaintiff was left with no remedy at all.

Members of the 100th Congress recognized the potential for abuse of these exceptions, especially with regards to malicious or bad faith actions, such as an assault or battery. If the act were deemed to lie within the scope of employment, then the perpetrator would become fully immune. As a matter of public policy, this was untenable.

Given these concerns, Members of the House Judiciary Committee carefully questioned Deputy Assistant Attorney General Wilmore, and received

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[38] House Report No. 100-700, (1988), reprinted in 1988 U.S.C.C.A.N. 5945, at 5947.

reassurances that criminal and abusive action would always fall outside the scope of employment. As stated by Mr. Wilmore, "employees accused of egregious misconduct –as opposed to mere negligence or poor judgment—will not generally be protected from personal liability for the results of their actions".[39]

Upon the request of U.S. Rep. Barney Frank, the Department of Justice also furnished a list of nine cases, illustrating acts that would not be deemed to fall within the scope of employment.[40] The proffered cases involved torts committed while using vehicles for personal purposes, as well as non garden-variety torts, such as the sexual molestation of a hospital patient by a Navy employee, and the rape and shooting of two women stopped by a military police officer.[41]

The intent of Congress was further clarified by the Report of the House Committee on the Judiciary, House Report No. 100-700, *reprinted in* 1988 U.S.C.C.A.N. 5945. Stressing that scope of

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[39] *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Before the Subcomm. On Administrative Law and Government Relations of the H. Comm. on the Judiciary*, 100th Cong. 79 (1988)("Westfall Committee Hearing")(prepared statement of Robert L. Wilmore, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

[40] Westfall Committee hearing, id. at 128-129.

[41] *Thigpen v. United States*, 618 F. Supp. 239 (D.S.C. 1985), *Bates v. United States*, 517 F. Supp. 1350 (W.D. Mo. 1981), *aff'd*, 701 F.2d 737 (8th Cir. 1983).

employment could never include egregious or seriously criminal acts, the Committee Members cited the eight criterion of the Restatement (Second) of Agency, including whether or not the action was seriously criminal[42]: "If an employee is accused of egregious misconduct, rather than mere negligence....then the United States may not be substituted as the defendant and the individual employee remains liable."

In short, the appellate decision in the case at bar not only distorts the law of the District of Columbia, but it places such jurisprudence squarely at odds with the intent of Congress in a matter of great federal importance. When such a collision is unavoidable, then federal interests should override otherwise controlling state law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). See also *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Indeed, state law has been set aside where necessary in other contexts involving the F.T.C.A.. See, e.g. *Garret v. Jeffcoat*, 483 F.2d 590 (4th Cir. 1973), *Munson v. United States*, 380 F.2d 976 (6th Cir. 1967).

In this case there is no need to set aside state law in any way. The jurisprudence of the District of Columbia is clearly in harmony with the goals and concerns of the United States Congress in passing both the Federal Tort Claims Act and the Westfall

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[42] The House Report No. 100-700, at p. 5949, cites the criteria set forth in Lester Jayson's treatise *Handling Federal Tort Claims* (1986 ed.), which in turn sets forth the criteria of the Restatement.

Act. The only conflicts here are those created for the first time by the erroneous decision of the Court of Appeals in this case.

D. Extraordinary Status of Torture:

In American jurisprudence, acts of torture have always been deemed the most abhorrent of governmental abuses. As Patrick Henry himself noted, most of the Colonists had fled to the New World to escape such horrors:

> "What has distinguished our ancestors? That they would not admit of tortures or cruel and barbarous punishment. But...Congress...may introduce the practice of France, Spain and Germany—of torturing ...and they will tell you it is a necessity of strengthening the arm of the government ....We are then lost and undone."

Culombe v. Connecticut, 367 U.S. 568, 581 n. 23 (1961), citing 3 Elliot's Debates (2d Ed. 1891), 447-48.

These sentiments have echoed through the centuries, and formed the very backbone of our jurisprudence. See, e.g. *Rochin v. California*, 342 U.S. 165 (1951), involving the forcible pumping of a suspect's stomach ("they are methods too close to the rack and screw to permit of constitutional differentiation"); *Hudson v. McMillian* 503 U.S. 1(1992)(sadistic beating of handcuffed prisoner), *Hope v. Pelzer*, 536 U.S. 730 (2002)(chaining of

prisoner to a hitching post and leaving him in the sun for hours without water or toilet privileges). See also *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

The legislative and executive branches have likewise closely adhered to the principle that there can be no tolerance for torture. This is reflected in such treaties as the Fourth Hague Convention of 1907,[43] the Third Geneva Convention of 1949,[44] the Convention Against Torture [45], the International Covenant on Civil and Political Rights,[46] and numerous others accords. It is also embodied in such domestic laws as the U.S. War Crimes Act of 1996, 18 U.S.C. §1441, and the Torture Statute, 18 U.S.C. §2340, both of which make it a felony for U.S. agents to engage in or abet torture abroad.

In full conformity with these principles, albeit somewhat ironically, President George H. Bush signed into law the Torture Victims Protection Act[47]

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[43] This Convention banned the torture of prisoners of war. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 4, 36 Stat. 2277, 205 Consol. T.S. 277.

[44] See, e.g. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, arts. 3 &13, 6 U.S.T. 3316, 75 U.N.T.S. 972.

[45] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N.GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

[46] G.A. res. 2200 (XXI), 21 U.N. GAOR Supp.(No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

[47] Torture Victim Protection Act, 28 U.S.C. 1350 n., Pub. L. No. 102-256, 106 Stat. 73 (1992).

on March 12, 1992, the very date of Mr. Bamaca's capture and the beginning of his three-year ordeal.

In the aftermath of the horrifying attacks of September 11, 2001, there have been many officials within the executive branch who would circumvent both Congress and the courts of law, and drag our nation from its most cherished values and bedrock legal principles. It is precisely during such times of fear and rage that our system of checks and balances has shown itself invaluable.

Both Congress and the courts have worked to conserve our government's separation of powers. As stated by U.S. Rep. McCollum, "[t]o even suggest that the U.S. government would condone the use of torture should shame everyone in this House."[48] See, also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(President does not have a blank check with regards to his war powers), *Boumedienne v. Bush* (June 13, 2008)(President does not have the power to determine when and where the constitution applies).

In the case at bar the executive branch seeks to grant to itself the blanket authority to utilize torture, even in the absence of any national security risks. This would expand yet further on its unilaterally claimed, and much challenged, post-September 11th powers. In short, as discussed above, the Respondents seek to create new and unheard of immunities for officials engaging in serious crimes and the abuse of the powers entrusted to them. Such immunities were prohibited in Nuremberg: "The

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[48] 151 Cong. Rec. E2634-35 (Daily Ed. Dec.22 2005).

official position of the defendants, whether as heads of state or responsible officials in government department, shall not be considered as freeing them from responsibility or mitigating punishment."[49]

There is no need, however, to look abroad for guidance. As the above legal analysis reflects, no immunities exist here, nor do any technicalities of state law impede a remedy. We are returned then, to the words of this court in *Butz v. Economou*:

"Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it". *Butz v. Economou*, 438 U.S. at 506 (citing *United States v. Lee*, 106 U.S. 196, 220 (1882).

VI. CONCLUSION

Petitioner respectfully asks this Court to grant the petition for a writ of certiorari to resolve the important questions of federal law presented by this case.

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[49] Nuremberg Charter, Art. 7: Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 279.

Respectfully Submitted,

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APPENDIX

1. United States Court of Appeals for the District of Columbia Circuit, Opinion, April 15, 2008.

United States Court of Appeals
For the District of Columbia Circuit

Argued October 22, 2007
Decided April 15, 2008

No. 06-5282

Jennifer K. Harbury On Her Own behalf And As Administratrix of the Estate of Efrain Bamaca-Velasquez,
Appellant

v.

Michael V. Hayden, Director,
Central intelligence Agency (CIA), Et Al.,
Appellees

Appeal from the United States District Court
For the District Of Columbia
(No. 96cv00438)

Before: Randolph and Kavanaugh, *Circuit Judges*, and Williams, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* Kavanaugh, with whom *Circuit Judge* Randolph joins, and with whom *Senior Circuit Judge* Williams joins except as to second sentence of footnote five.

KAVANAUGH, *Circuit Judge:* In the early 1990s, members of the Guatemalan army killed rebel fighter Efrain Bamaca-Velasquez during Guatemala's civil war. Bamaca's widow, Jennifer Harbury, sued various U.S. Government officials, claiming they were legally responsible for the physical abuse and death of her husband. The District Court long ago dismissed most of Harbury's claims. Harbury now appeals the District Court's order dismissing her common-law tort claims. We affirm for either of two alternative jurisdictional reasons: (1) Under this Court's precedents, the case presents a nonjusticiable political question; or (2) the Federal Tort Claims Act applies to Harbury's claims, and the FTCA bars suits based on injuries that occurred in a foreign country.

I

Jennifer Harbury is a U.S. citizen and the widow of Efrain Bamaca-Velasquez, who was a citizen of Guatemala and a commander of rebel forces in that country's 35-year civil war. According to Harbury, in the 1990s the U.S. Central Intelligence Agency hired and trained Guatemalan army officers as informants so that the CIA could gather information about the rebel

forces. Harbury alleges that the CIA obtained information from the Guatemalan army officers and shared it with the White House and the State Department during the Administrations of President George H.W. Bush and President Clinton. Harbury claims, moreover, that "it was understood . . . and/or intended by the CIA that this information would be obtained through torture and similar means." Second Amended Complaint at 11, Harbury v. Hayden, 444 F. Supp. 2d 19 (D.D.C. 2006) (Civ. No. 96-438).

Harbury specifically contends that Bamaca was captured in March 1992 by Guatemalan army officers affiliated with the CIA. The CIA allegedly reported to the White House and U.S. Government agencies that its Guatemalan counterparts had captured Bamaca "and that they would probably fabricate his combat death in order to be able to maximize their ability to extract information" from him. *Id.* at 9. At the same time that the Guatemalan army publicly maintained that Bamaca had committed suicide, its officers allegedly "detained, psychologically abused and physically tortured" Bamaca in an attempt to get information from him. *Id.* According to Harbury, the Guatemalan officers then killed Bamaca.

Harbury initially sued and sought damages from many U.S. Government officials *in their personal capacities* -- (i) at the CIA, Directors John M. Deutch, R. James Woolsey, and Robert M. Gates; Deputy Directors David Cohen, John J. Devine, Thomas A. Twetten, John C. Gannon, Douglas J. MacEachin, and John L. Helgerson; Latin American Division Chief Terry R. Ward; National Intelligence Officer Brian Latelle;

National Intelligence Council Chiefs Richard N. Cooper, Christine N. Williams, Joseph S. Nye, and Fritz W. Esmarth; Guatemala Station Chiefs Dan Donahue and Frederick A. Brugger; and "unnamed employees" of the CIA; (ii) at the State Department, Secretary of State Warren Christopher; U.S. Ambassador to Guatemala Marilyn MacAfee; Assistant Secretary Alexander Watson; Deputy Assistant Secretary Anne Patterson; Guatemala Desk Officer Peg Willingham; and "unnamed employees" of the State Department; and (iii) at the National Security Council, National Security Advisor Anthony Lake; NSC staff member Richard E. Feinberg; and "unnamed employees" of the National Security Council. *See id.* at 1-2,5-8.

The District Court previously dismissed most of Harbury's claims. *See Harbury v. Hayden,* 444 F. Supp. 2d 19, 24 (D.D.C. 2006) (citing cases and orders); *see also Christopher v. Harbury,* 536 U.S. 403, 405, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002).

Harbury's only remaining claims are common-law tort claims against the individual CIA Defendants. Harbury alleges that the individual CIA Defendants conspired to cause Bamaca's imprisonment, torture, and execution; negligently supervised their Guatemalan counterparts, resulting in Bamaca's injury and death; and caused emotional distress to Harbury as a result of Bamaca's injury and death. The District Court dismissed these claims under *Federal Rule of Civil Procedure 12(b)(1).* Harbury now appeals; our review is de novo.

II

To explain the District Court's decision and Harbury's appeal, we begin with a brief overview of the Federal Tort Claims Act and the Westfall Act.

The Federal Tort Claims Act is a limited waiver of the Government's sovereign immunity. Under the FTCA, plaintiffs may sue the United States in federal court for state-law torts committed by government employees within the scope of their employment. *28 U.S.C. §§ 1346(b), 2671-80.* But the FTCA does not create a statutory cause of action against individual government employees.

If a plaintiff files a state-law tort suit against an individual government employee, a companion statute -- the Westfall Act -- provides that the Attorney General may certify that the employee was acting within the scope of employment "at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). Upon the Attorney General's certification, the tort suit automatically converts to an FTCA "action against the United States" in federal court; the Government becomes the sole party defendant; and the FTCA's requirements, exceptions, and defenses apply to the suit. *Id.*[1]

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[1] If the Attorney General does not certify that the defendant employee was acting within the scope of employment, the defendant may petition the court to make such a finding. If the court so finds, then the case becomes a federal-court FTCA case against the government, just as if the Attorney General had filed a certification. 28 U.S.C. §2679 (d)(3)-(4). If the court finds that the government employee was not acting within the scope of

In many cases, the Attorney General's certification begins and ends the scope-of-employment analysis. The Government takes over as the sole party defendant, and the suit proceeds under the FTCA. From the plaintiff's perspective, this can produce a net positive: Although the plaintiff must now litigate against the Federal Government, the original defendant -- a potentially judgment-proof federal employee -- has been replaced by the seemingly bottomless U.S. Treasury.

Plaintiffs do not always view certification so charitably, however. As mentioned earlier, the FTCA is a *limited* waiver of sovereign immunity. The Act contains several exceptions -- for example, it does not apply to claims for lost mail, suits in admiralty, claims arising out of the military's combatant activities during wartime, claims based on discretionary functions, or claims that arise in foreign countries, among other exceptions. *See* 28 U.S.C. § 2680. When one of the FTCA's exceptions applies -- that is, when the Government has *not* waived its sovereign immunity -- the Attorney General's scope-of-employment certification has the effect of converting the state-law tort suit into an FTCA case over which the federal courts lack subject-matter jurisdiction. In other words, the combination of the scope-of-employment determination and the FTCA's exceptions may absolutely bar a plaintiff's case. *See United States v. Smith,* 499 U.S. 160, 166, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991).

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employment, then the state law tort suit may proceed against the government employee in his or her personal capacity.

In such cases, to try to preserve their lawsuits, plaintiffs often contest the Attorney General's scope-of-employment certification. Plaintiffs typically argue that the individual government employee defendants did *not* act within the scope of their employment and that the suits should therefore continue as state-law tort suits against the government officials in their personal capacities. Once a plaintiff advances this argument, courts consider the scope-of-employment issue essentially de novo based on the state law of the place where the employment relationship exists. If the court agrees with the Attorney General, the suit becomes an action against the United States that is governed by the FTCA. But if the court disagrees with the Attorney General's determination, the state-law tort suit may proceed against the defendant government employee in his or her personal capacity. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423-24, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995); *Council on Am. Islamic Relations v. Ballenger*, 370 U.S. App. D.C. 314, 444 F.3d 659, 662 (D.C.Cir.2006).

Harbury's case followed this procedural course. Among other claims, Harbury brought common-law tort claims against the individual CIA Defendants. In March 2000, Attorney General Reno certified that the individual CIA Defendants had acted within the scope of their employment. The Attorney General's certification removed the individual CIA Defendants from the tort action, substituted the United States as the sole party defendant, and rendered all of Harbury's tort claims subject to the FTCA and its exceptions, including the

foreign-country exception.

Harbury then challenged the Attorney General's certification, arguing based on D.C. law that the individual CIA Defendants did not act within the scope of their employment. The District Court disagreed: It ruled that the FTCA applied to all of Harbury's tort claims and held that it lacked subject-matter jurisdiction because the claims fell within the FTCA's exception for claims "arising in a foreign country." 28 U.S.C. § 2680(k); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (foreign-country exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred").

On appeal, Harbury argues that the individual CIA Defendants did not act within the scope of their employment under D.C. law because "acts of torture can never fall within the scope of employment." Harbury Br. at 14. According to Harbury, Attorney General Reno and the District Court erred in certifying the acts as within the individual CIA Defendants' scope of employment, the FTCA therefore does not apply, and Harbury can maintain tort claims against the individual CIA Defendants in their personal capacities. To the extent the scope-of-employment certification was proper and Harbury's claims are converted into FTCA claims against the United States, Harbury separately argues that at least some of the claimed injuries, such as her emotional distress, occurred in the United States, and that the FTCA's foreign-country exception therefore does not bar those claims against the

Government.[2]

III

Pointing to recent cases from this Circuit, the Government contends that all of Harbury's claims pose "political questions" that the federal courts may not consider.

The political question doctrine is an important tenet of separation of powers and judicial restraint. But the doctrine is notorious for its imprecision, and the Supreme Court has relied on it only occasionally. As Judge Bork explained a generation ago, "That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court and among scholars." *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) (citations omitted). Judge Bork's observation remains true today.

The Supreme Court has held that the political question doctrine bars judicial resolution of certain issues textually and exclusively committed by the

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2 Unlike under the FTCA and the Westfall Act, no scope-of-employment certification process is available for Bivens claims against individual federal officials. But aliens such as Bamaca who were injured outside the United States typically cannot bring such constitutional claims. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990). This Court therefore previously dismissed Bivens claims that harbury brought on behalf of her late husband. *See Harbury v. Deutch*, 233 F.3d 596,602-04 (D.C. Cir. 2000)

Constitution to one or both of the other branches of the Federal Government. *Baker v. Carr,* 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *see also Nixon v. United States,* 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993); *Goldwater v. Carter,* 444 U.S. 996, 1002, 100 S. Ct. 533, 62 L. Ed. 2d 428 (1979) (opinion of Rehnquist, J., for four Justices); *Gilligan v. Morgan,* 413 U.S. 1, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973). The Court in *Baker* also held that the political question doctrine applies when there is a "lack of judicially discoverable and manageable standards for resolving" a case; in practice, however, this is often equivalent to a merits determination. 369 U.S. at 217; *see also Vieth v. Jubelirer,* 541 U.S. 267, 277-291, 124 S. Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion).

Although those first two factors -- textual commitment and lack of judicially manageable standards -- are the most important, the Court also considers others: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; "an unusual need for unquestioning adherence to a political decision already made"; and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker,* 369 U.S. at 217. As the *Baker* Court recognized in discussing those political question factors, judicial restraint in the area of foreign affairs is often appropriate because such cases "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or

legislature." *Id.* at 211. The Court cautioned, however, that "it is error to suppose that every case or controversy which touches foreign relations, lies beyond judicial cognizance." *Id.* Instead, each case involves a "discriminating analysis of the particular question posed." *Id.*

Although the contours of the political question doctrine may be uncertain, this Court has relied on the doctrine in three recent cases that are indistinguishable from this case and control our decision here.

In *Schneider v. Kissinger,* children of a deceased Chilean general brought tort claims against former U.S. officials. 366 U.S. App. D.C. 408, 412 F.3d 190, 192 (D.C. Cir. 2005); *see also Schneider v. Kissinger,* 310 F. Supp. 2d 251, 257 (D.D.C. 2004) (describing claims). The plaintiffs alleged that, in 1970, then-National Security Advisor Henry Kissinger and then-CIA Director Richard Helms supported Chileans in Chile as they kidnapped, tortured, and killed General Rene Schneider during a military coup d'etat. 412 F.3d at 191-92. In response to the plaintiffs' charges against Kissinger and Helms, the Attorney General certified that both men had acted within the scope of their federal employment. *Id.* At 192.

This Court held that the case presented a nonjusticiable political question. *Id.* at 198. The Court explained that the suit challenged the merits of foreign policy decisions that the Constitution assigns to the political branches. *Id.* at 195. The Court also found a lack of judicially discoverable and manageable standards regarding "the government's use of covert

operations in conjunction with political turmoil in another country." *Id.* at 197. Citing *Baker,* the Court stated that it could not entertain the lawsuit without expressing a lack of respect for a coordinate branch of the Government. *Id.* at 197-98.

This Court again applied the political question doctrine in *Gonzalez-Vera v. Kissinger,* 371 U.S. App. D.C. 242, 449 F.3d 1260 (D.C. Cir. 2006). In that case, the plaintiffs brought tort claims against former National Security Advisor Kissinger. *Id.* at 1263. According to the plaintiffs, after the U.S. Government and Kissinger supported the 1973 coup d'etat in Chile that installed Augusto Pinochet as President of the newly formed military junta, they supported a "Chilean terror apparatus" that "brutally repressed and attempted to eliminate individuals opposed to Pinochet's regime" -- including the plaintiffs and their relatives. *Id.* at 1261 (internal quotation marks and alterations omitted). In response to the plaintiffs' charges, the Attorney General certified that Kissinger had acted within the scope of his employment as a U.S. official. *Id.* at 1262.

As in *Schneider,* the *Gonzalez-Vera* Court held that the plaintiffs' claims posed a nonjusticiable political question. The plaintiffs attempted to distinguish their case from *Schneider* by arguing that they challenged "specific acts of torture" that occurred after the coup d'etat rather than the "Government's policy decision to support Pinochet's rise to power." *Id.* at 1263 (internal quotation marks omitted). But this Court found that evaluating "the legal validity of those measures would require us to delve into questions of policy textually committed to a coordinate branch of government." *Id.*

(internal quotation marks omitted). The Court also rejected the plaintiffs' attempt to characterize the defendants' actions as "*ultra vires,*" noting that Kissinger had acted within the authority delegated to himby the President. *Id.* at 1264.

The third of this Court's cases that bears directly on the political question analysis is *Bancoult v. McNamara,* 370 U.S. App. D.C. 348, 445 F.3d 427 (D.C. Cir. 2006). In that case, former residents of the island of Diego Garcia sued several current and former officials of the Departments of Defense and State under international law. *Id.* at 430-31. The plaintiffs claimed that the U.S. Government and individual U.S. officials caused the forcible relocation, torture, and killing of island residents in the 1960s as the Government depopulated the island to establish a military base. *Id.* In response to the plaintiffs' allegations, the Attorney General certified that the defendant government officials had acted within the scope of their employment. *Id.* at 431.

This Court concluded that the case presented a nonjusticiable political question because the "specific tactical measures allegedly taken" to depopulate Diego Garcia and build the base were "inextricably intertwined" with foreign policy questions -- such as "the decision to establish a military base" and "the underlying strategy of establishing a regional military presence," neither of which was reviewable. *Id.* at 436. The *Bancoult* Court rejected the plaintiffs' efforts to distinguish between foreign policy and government officials' implementation of that policy. *Id.* at 436-37.

Even if the individual defendants' "actions were not in conformance with presidential orders, the actions alleged were still closely enough connected to [their] employment to bring them within the ambit of the political question doctrine." *Id.* at 437. The individual defendants acted in pursuit of an authorized goal -- establishing a military base -- and as "high-level executive officers," they "inherently possessed a large, measure of discretion in carrying out the tasks assigned to them by the President." *Id.* at 438. The Court held that "when the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the individuals who committed the acts in question within the scope of their employment." *Id.*

Under our recent decisions in *Schneider, Gonzalez-Vera,* and *Bancoult,* the political question doctrine plainly applies to this case. In all three cases, as in Harbury's case, the Attorney General certified that the defendants had acted within the scope of their employment. *See Schneider,* 412 F.3d at 192; *Gonzalez-Vera,* 449 F.3d at 1262; *Bancoult,* 445 F.3d at 431. In *Schneider* and *Gonzalez-Vera,* as in Harbury's case, the plaintiffs contended that U.S. officials were responsible for physically abusing and killing foreign nationals in their home country. *Schneider,* 412 F.3d at 191-92; *Gonzalez-Vera,* 449 F.3d at 1261. And although the plaintiffs in all three cases argued that they challenged specific acts and not general Executive Branch foreign policy decisions, this Court reasoned that the cases sought determinations whether the alleged conduct *should* have occurred, which impermissibly would require examining the wisdom of

the underlying policies. *Schneider,* 412 F.3d at 197; *Gonzalez-Vera,* 449 F.3d at 1263-64 *Bancoult,* 445 F.3d at 436[3].

In sum, we find no remotely plausible basis to distinguish this case from *Schneider, Gonzalez-Vera,* and *Bancoult.* Therefore, under our precedents, we must dismiss Harbury's claims based on the political question doctrine.

IV

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[3] In all three cases, as in Harbury's case, the Attorney General certified that the government officials acted within the scope of their foreign policy or national security employment. In tort cases arising in the national security or foreign policy context-such as *Schneider, Gonzalez-Vera,* and *Bancoult* the political question doctrine counsels strongly against judicial second guessing of the Attorney General's certification for much the same reason that courts are cautious about entertaining the merits of the tort claims:Doing so would require courts to intrude deeply into the foreign policy and national security decision making process of the Executive Branch. See *Christopher v. Harbury, 536 U.S. 403, 417 (2002)*("The action alleged on the part of all the Government defendants...was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be a judicial inquiry, it will raise concerns for the separation of powers in trenching on matters committed to other branches."); cf. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 733 n. 21 (2004); *Republic of Austria v. Altmann,* 541 U.S. 677, 702 (2004). On the other hand, the political question doctrine ordinarily would not apply to a tort case against an individual government official when the Attorney General has affirmatively declined to issue a scope of employment certification: It commonly would make little sense to dismiss an otherwise cognizable tort case against an Executive Branch official as a "political question" when the Executive branch itself disclaimed the conduct and concluded that the official acted *outside* the scope of employment.

A recent decision of this Court considered allegations similar to Harbury's and did not rely on the political question doctrine. *See Rasul v. Myers,* 512 F.3d 644 (D.C. Cir. 2008). Even if we likewise do not rely on the political question doctrine, however, we still affirm the dismissal of Harbury's case on alternative jurisdictional grounds. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999). The FTCA applies to Harbury's tort claims, and the FTCA bars suits based on injuries suffered in a foreign country.

In *Rasul,* former detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, sued a former Secretary of Defense and several military officers in their personal capacities, alleging wrongful detention, physical abuse, and "cruel, inhuman or degrading treatment." 512 F.3d at 651. In response to the charges, the Attorney General issued a Westfall Act certification that the individual defendants had acted within the scope of their employment, thereby converting the claims against the individual officials into FTCA claims against the United States. *Id.* at 655. The Court then dismissed the FTCA claims against the Government for lack of subject-matter jurisdiction because the plaintiffs had failed to exhaust their administrative remedies as required by the FTCA. *Id.* at 661; *see also* 28 U.S.C. § 2675(a).

In the *Rasul* litigation, the Government did not argue that the case was nonjusticiable under the political question doctrine. And this Court did not address that doctrine or our decisions in *Schneider, Gonzalez-Vera,*

or *Bancoult.*

The *Rasul* Court instead considered the detainees' challenge to the Attorney General's scope-of-employment certification. Applying D.C. law, the Court held that the defendants' alleged conduct fell within the scope of their employment because the alleged wrongful acts were "tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." 512.F.3d at 658 (internal quotation marks omitted). The alleged torts therefore were "incidental to the defendants' legitimate employment duties" in detaining and interrogating suspected enemy combatants. *Id.* at 659. The Court rested its scope-of-employment analysis on several D.C. cases holding that seriously criminal and violent conduct can still fall within the scope of a defendant's employment under D.C. law --including sexual harassment, a shooting, armed assault, and rape. *See id.* at 657-58 (citing *Howard Univ. v. Best,* 484 A.2d 958, 987 (D.C. 1984) (university dean acted within scope of employment in sexually harassing faculty member during meetings); *Johnson v. Weinberg,* 434 A.2d 404, 409 (D.C. 1981) (laundromat employee acted within scope of employment in shooting customer during dispute over removing clothes from washing machine); *Lyon v. Carey,* 174 U.S. App. D.C. 422, 533 F.2d 649, 652 (D.C. Cir. 1976) (mattress deliveryman acted within scope of employment in raping customer after dispute arose during delivery).[4]

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[4] At first blush, D.C. scope- of- employment law might seem counterintuitive. How could committing physical abuse, for example, be within the scope of and individual's employment? The explanation is straightforward: Many states and D.C. apply the

Under D.C. law as applied in *Rasul,* the individual CIA Defendants in this case similarly acted within the scope of their employment. Their jobs involved hiring and managing informants, conducting covert operations, and gathering intelligence. *See* 50 U.S.C. §§ 403-4(b), 403-4a(d). In performing those responsibilities, they allegedly gathered information related to a decades-long civil war in Guatemala and worked with individuals in Guatemala who abused and killed Harbury's husband. Under D.C. law, those actions were incidental to their authorized conduct: The actions were "foreseeable" as a "direct outgrowth" of their responsibility to gather intelligence and were "undertaken on the [Government's] behalf." *Rasul,* 512 F.3d at 657 (internal quotation marks omitted). Although Harbury alleges that her husband suffered physical abuse, that does not alter the scope-of-employment analysis: The *Rasul* decision -- and the D.C. cases on which the *Rasul* Court relied -- hold that allegations of physical abuse still fall within the scope

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scope-of-employment test very expansively, in part because doing so usually allows an injured tort plaintiff a chance to recover from a deep-pocket employer rather than a judgment proof employee. See RESTATEMENT (THIRD) OF AGENCY § 204 cmt. B (2006)(Respondeat Superior...reflects the likelihood that an employer will be more likely to satisfy a judgment.") The scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort. Because of the broad scope- of- employment standard in many states and D.C., and because the FTCA and the Westfall Act incorporate the relevant state's test, tort claims against the federal government employees often proceed against the government itself under the FTCA rather than against the individual employees under state law.

of employment if such actions were foreseeable. *See id.* at 660 ("[T]he tortious conduct was triggered or motivated or occasioned by the conduct then and there of the employer's business even though it was seriously criminal.") (internal quotation marks and alterations omitted); *see also Lyon,* 533 F.2d at 655; *Weinberg,* 434 A.2d at 409; RESTATEMENT (SECOND) OF AGENCY §228(1)(1958).

Because the alleged actions of the individual CIA Defendants were within the scope of their employment, Harbury's claims against the individual CIA Defendants are properly converted into claims against the Government under the FTCA. But Harbury's FTCA claims against the Government fall squarely within the FTCA's exception for claims "arising in a foreign country." 28 U.S.C. § 2680(k). In particular, Harbury's claims on behalf of her husband's estate arise in Guatemala because he suffered the alleged injuries there. *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 700-01, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). And to the extent Harbury alleges her own emotional injuries in the United States as a result of the death of her husband, those derivative claims similarly arise in Guatemala for purposes of the FTCA because they are based entirely on the injuries her husband suffered there. A plaintiff in Harbury's situation cannot plead around the FTCA's foreign-country exception simply by claiming injuries such as "emotional distress" that are derivative of the foreign-country injuries at the root of the complaint. Much like the now-defunct "headquarters doctrine," that practice would threaten to "swallow the foreign country exception whole." *Id.* at 703; *see also Harbury v. Hayden,* 444 F. Supp. 2d 19, 43

(D.D.C. 2006). We follow the lead of *Sosa* and decline to allow this kind of creative pleading to water down the foreign-country exception to the FTCA.

In sum, even apart from the political question doctrine, we lack subject-matter jurisdiction to consider Harbury's tort claims because the FTCA applies and the claims fall within that statute's foreign-country exception.[5]

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5. Harbury also argues that count 28 of her complaint raised a claim against the individual CIA Defendants under the Torture Victim protection Act. As the District Court held, however, count 28 asserted only a common law international tort claim that, like Harbury's other tort claims, was converted into an FTCA claim against the United States by the Attorney general's proper scope -- of- employment certification. See *Harbury v. Hayden*, 444 F. Supp. 2d 19, 37-43 (D.D.C. 2006). Even if Harbury's complaint had asserted a TVPA claim, moreover, the claim would pose a non-justiciable political question under our precedents. *See, e.g., Gonzalez-Vera v. Kissinger*, 449 F. 3d 1260, 1264 (D.C. Cir. 2006)(TVPA claim, "like any other, may not be heard if it presents a political question"). (Judge Williams would affirm the dismissal of count 28 solely on political question grounds and not on the alternative ground that Harbury failed to state a claim under the TVPA. IN support of that view, he points to the language in count 28 claiming that the individual CIA defendants participated or collaborated in torture and extrajudicial execution in violation of "the law of the United States," and to two prior opinions of the District Court (those of march 9, 2000, and March 13, 2001, see J.A. 112, 119) characterizing Harbury as having "name[d]" the TVPA as a basis for count 28.

Apart from those defects, to state a TVPA claim, Harbury would still have to clear the hurdle of showing that the individual CIA Defendants- who of course are *American* official- acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. §1350 note; *see also Arar v. Ashcroft* , 414 F. Supp. 2d 250, 266 (E.D.N.Y. 2006). Because Harbury's complaint

We affirm the District Court's judgment dismissing Harbury's suit.

So ordered.

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did not allege a TVPA claim, and because such a claim would pose a nonjusticiable political question, we need not address the scope of the TVPA as applied to U.S. officials however.

2. United States Court of Appeals for the District of Columbia Circuit, Judgment, April 15, 2008

United States Court of Appeals
For the District of Columbia Circuit

No. 06-5282
September Term 2007

Filed

On: April 15, 2008

Jennifer K. Harbury on her Own Behalf and as Administratrix of the Estate of Efrain Bamaca-Velasquez

Appellant

v.

Michael V. Hayden, Director, Central Intelligence Agency (CIA), Et Al.

Appellees

Before: Randolph and Kavanaugh, *Circuit Judges*, and Williams, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

For the Court:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Date : April 15, 2008
Opinion for the court filed by Circuit Judge Kavanaugh in which Circuit Judge Randolph joins and Senior Circuit Judge Williams joins with the exception of the second sentence of footnote five.

3. United States District Court, District of Columbia, Opinion, August 1, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER K.. HARBURY on her Own Behalf and as administratrix of The Estate of Efrain Bamaca-Velasquez,	§	
Plaintiff,	§	
v.	§	C. A. No. 96-438(CKK)
MICHAEL V. HAYDEN Director of The Central Intelligence Agency, et al.,	§	
Defendants,	§	

Memorandum Opinion
August 1, 2006

Plaintiff Jennifer K. Harbury brought this action on her own behalf and as administratrix of the estate of her deceased husband, Efrain Bamaca-Velasquez ("Bamaca"), on March 7, 1996 against the Central Intelligence Agency ("CIA"), the Department of State ("State"), and the National Security Council ("NSC"), as well as numerous named individual employees within each of those agencies. Plaintiff's Complaint, as amended, included twenty-eight (28) counts alleging violations variously of constitutional law, international law, and common law arising from the alleged imprisonment, torture, and death in Guatemala of her husband, a guerilla rebel leader in the Guatemalan resistance movement in the early 1990s. *See* Pl.'s Second Am. Compl. PP 103-244.[1] Following a series of opinions by this Court, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, six counts in Plaintiff's Second Amended Complaint remain viable -- Counts 18-19 (intentional infliction of emotional distress), Counts 20-22 (negligent supervision), and Count 28 (emotional distress/loss of companionship).

Currently before the Court is Defendant's Motion to Dismiss All Remaining Counts of the Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3)

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[1] The lead named defendant in Plaintiff's Second Amended Complaint is John M. Deutch, former Director of the CIA who headed the agency from 1995-1996. Pursuant to Rule 25(d)(1) of the federal Rules of Civil Procedure, the Court substitutes Michael V. Hayden, the current Director of the CIA, as named defendant.

(hereinafter, "Defendant's Motion to Dismiss"), which contends that this Court lacks subject matter jurisdiction over Plaintiff's action following the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) -- a ruling that held that the Federal Tort Claims Act's ("FTCA") "foreign country exception," *see* 28 U.S.C. § 2680(k) , "bars all claims based on any injury suffered in a foreign country regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712, 124 S. Ct. 2739. Upon a searching examination of Defendant's motion, Plaintiff's Opposition, Defendant's Reply, Plaintiff's Surreply, Defendant's Surrebuttal, the relevant case law, and the entire record herein, the Court shall grant Defendant's Motion to Dismiss and shall dismiss all counts remaining in Plaintiff's action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

I: BACKGROUND

Given that the basic facts and allegations of this case have been fleshed out in great detail in previous decisions relating to this case, *see, e.g., Christopher v. Harbury*, 536 U.S. 403, 406-410, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), the Court shall only briefly summarize the relevant background in this Memorandum Opinion. [2]Plaintiff Jennifer K. Harbury, a United States citizen, is the widow of Efrain Bamaca-

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[2] Given that the Court is reviewing a motion to dismiss, the Court shall accept Plaintiff's factual allegations and take them in the light most favorable to her. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed.2d 517 (1993).

Velasquez, a Guatemalan citizen and rebel leader in the Guatemalan National Revolutionary Union ("U.R.N.G.") who vanished in his own country in March 1992. *See* Pl.'s Second Am. Compl. PP 9, 33-34. According to Plaintiff's allegations, Bamaca was captured by Guatemalan army forces, including officers who were trained in the United States and paid/used as informants by the CIA. Id. PP 35-42, 46-47. Bamaca was then summarily executed on orders of the same Guatemalan officers affiliated with the CIA, *id.* PP 48-49, sometime before September 1993, *id.* PP 66, 84.

Plaintiff asserts that the CIA knew as early as March 18, 1992 that the Guatemalan army had captured Bamaca alive and shared this information with both the White House and the State Department. *Id.* P 35. However, when Plaintiff sought aid from [**7] the State Department in the search for her husband, officials therein "intentionally misled" Plaintiff, by "deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture." *Id.* P 67. Throughout the period stretching from 1992 through 1995, Plaintiff was in frequent contact with the State Department, seeking to gain any information relating to her husband and participating in various hunger strikes to focus public attention on the issue. *Id.* PP 56-68, 70-71, 75, 80, 83. Plaintiff finally learned of her husband's death in March 1995 -- nearly one and a half years after his apparent passing -- when a congressman publicly announced that Bamaca had been killed on the orders

of a Guatemalan army colonel who was also a paid contractor of the CIA. *Id.* 91.

A year later, in March 1996, Plaintiff brought the present suit before this Court against the CIA, the State Department, the NSC, and various members of each agency in their official and individual capacities. *See generally* Compl. Plaintiff's Second Amended Complaint, which is currently the controlling document in this case, listed twenty-eight (28) causes-of-action under federal, state, and international law. Following a series of decisions, such as this Court's March 23, 1999 Memorandum Opinion and Order, *see Harbury v. Deutch*, No. 96-00438 (CKK), 1999 U.S. Dist. LEXIS 22414, 1999 WL 33456919 (D.D.C. Mar. 23, 1999), *aff'd in part, rev'd in part*, 344 U.S. App. D.C. 68, 233 F.3d 596 (D.C. Cir. 2000), *aff'd* 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (affirming the district court opinion in full, reversing the D.C. Circuit's reversal-in-part), and this Court's March 9, 2000 Memorandum Opinion and Order, *see Harbury v. Deutch*, Civ. No. 96-438 (D.D.C. Mar. 9, 2000), only six (6) counts remain presently viable in this case -- Counts 18-22, and Count 28. These remaining counts maybe grouped into two major categories. First, Plaintiff has alleged common law torts invoking the Federal Tort Claims Act, 28 U.S.C. §§ 2401(b) and 2675, (1) on behalf of herself and her husband's estate against the CIA defendants for intentional infliction of emotional distress by causing and conspiring to cause Bamaca's imprisonment, torture, and execution, *see* Pl.'s Second Am. Compl. PP 196-201 (Counts 18-19); and (2) on behalf of her husband's estate against the CIA defendants for negligent supervision resulting in his

false imprisonment, assault and battery, and wrongful death, *id.* PP 202-216 (Counts 20-22). Second, Plaintiff has bought a tort claim said to arise under "international law, including the law of war" against the CIA defendants on behalf of herself and her husband's estate, *id.* PP 241-244 (Count 28). Given concerns regarding the scope and clarity of Count 28, the Court ordered and Plaintiff provided a "Submission of a More Detailed Statement Regarding Count 28 of Her Complaint" on April 19, 1999. *See* Pl.'s Submission of Detailed Stmt. re: Count 28 at 1-7.

Importantly, on March 31, 2000, the Attorney General certified that the seventeen (17) individually-sued federal defendants were acting within the scope of their employment with respect to the incidents alleged in Plaintiff's Second Amended Complaint. *See* Cert. of Mark E. Nagle on behalf of the Attn'y Gen., *attached to* Defs.' Suppl. Mot. to Dismiss (Apr. 3, 2000). By operation of 28 U.S.C. § 2679(d)(4), the so-called Westfall Act, Plaintiff's action became one against the United States as the sole party defendant. Pursuant to 28 U.S.C. § 2679(b)(1) ("exclusiveness of remedy"), Plaintiff's action -- from that point forward -- became governed exclusively by the FTCA, including the limitations and exceptions to the waiver of sovereign immunity set forth in that statutory scheme.

Concurrent with the Attorney General's certification, Defendant filed a supplemental motion to dismiss in this case. Through a Memorandum Opinion and Order dated March 13, 2001, this Court denied without prejudice the Government's supplemental motion seeking dismissal on the basis of the discretionary

function and independent contractor exceptions to the FTCA, and denied without prejudice the Government's motion seeking dismissal on the basis of the political question doctrine and the "foreign country exception" to the FTCA, 28 U.S.C. § 2680(k) (excepting from FTCA jurisdiction "[a]ny claim arising in a foreign country"). *See Harbury v. Deutch*, Civ. No. 96-438 (CKK) (D.D.C. Mar. 13, 2001) (memorandum opinion and order denying Government's supplemental motion to dismiss). In rejecting the "foreign country exception" as the basis for dismissal, the Court relied on the D.C. Circuit's decision in *Sami v. United States*, 199 U.S. App. D.C. 173, 617 F.2d 755 (D.C. Cir. 1979), emphasizing that "the United States enjoys no exemption from liability 'for acts or omissions occurring here which have their operative effect in another country.'" *Id.* at 17 (quoting *Sami*, 617 F.2d at 762). Pursuant to *Sami*, which was then controlling precedent, the Court therefore found that "to the extent Harbury alleges tortious acts which occurred in the United States, though their effect might have been felt in Guatemala, these are not covered by the foreign country exception." *Id.*; *see also id.* at 17 n.11 (noting that the "foreign country exception" also does not bar "those acts occurring here which [Harbury] alleges took effect here, such as the acts allegedly occasioning her claim of intentional infliction of emotional distress").

The United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), issued on June 29, 2004, specifically rejected the "headquarters doctrine" established in *Sami*, *see id.* at 701, 124 S. Ct. 2739 (explicitly abrogating *Sami*), under the theory that such a

doctrine "threatens to swallow the foreign country exception whole, certainly at the pleading stage," *id.* at 703, 124 S. Ct. 2739. Following an [*26] analysis of the language and legislative history of the FTCA's "foreign country exception," the *Sosa* Court laid down the basic rule that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* at 711, 124 S. Ct. 2739. Given the abrogation of *Sami* in the wake of *Sosa* and the apparent tenuousness of this Court's March 13, 2001 Memorandum Opinion and Order, Defendant has filed a Motion to Dismiss All Remaining Counts of the Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3). Defendant's motion contends, in short, "[b]ecause *Sosa* eliminates from the jurisdictional reach of the FTCA all claims based on harm occurring in a foreign country, there is no subject matter jurisdiction over this action and the action must be dismissed as a matter of law." Def.'s Mot. to Dismiss at 5.

II: LEGAL STANDARDS

Defendant brings this motion pursuant Federal Rule of Civil Procedure 12(h)(3), which provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). However, Rule 12(h)(3) merely clarifies that lack of subject matter jurisdiction is a defense that is never waived and that, if such jurisdiction is lacking, the appropriate disposition is dismissal. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

Procedure § 1347, at 49 (3d ed. 2004). When faced with what a party characterizes as a Rule 12(h)(3) motion, a court should treat the motion as a traditional Rule 12(b)(1) motion for lack of subject matter jurisdiction. *See Haase v. Sessions*, 266 U.S. App. D.C. 325, 835 F.2d 902, 905-06 (D.C. Cir. 1987) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)); [**14] *see also United States ex rel. El-Amin v. George Washington Univ.*, 2005 U.S. Dist. LEXIS 3563, No. Civ. A 95-2000 (JGP), 2005 WL 485971, at *3 (D.D.C. Feb. 25, 2005).

A court must dismiss a case when it lacks subject matter jurisdiction pursuant to Rule 12(b)(1). In general, a motion to dismiss under Federal Rule of Civil Procedure 12(b) should not prevail "unless plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Kowal v. MCI Communications Corp.*, 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). A court may appropriately dispose of a case under 12(b)(1) for standing, and may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coalition for Underground Expansion v. Mineta*, 357 U.S. App. D.C. 72, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted); *see also Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 n.1 (D.D.C. 2002) ("A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of venue, personal jurisdiction or subject matter jurisdiction."); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) ("where

a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment") (citing *Greenberg v. The Life Ins. Co. of Virginia,* 177F.3d 507, 515 (6th Cir. 1999)). At the stage in litigation when dismissal is sought, the plaintiff's complaint must be construed liberally, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts. *EEOC v. St. Francis Xavier Parochial Sch.*, 326 U.S. App. D.C. 67, 117 F.3d 621, 624 (D.C. Cir. 1997). In spite of the favorable inferences that a plaintiff receives on a motion to dismiss, it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence. *Am. Farm Bureau v. United States EPA,* 121 F. Supp. 2d 84, 90 (D.D.C. 2000).

III: DISCUSSION

In response to Defendant's Motion to Dismiss and its reliance upon the *Sosa* decision, Plaintiff agrees that "the *Sosa* ruling applies . . . to tort claims for which the United States may lawfully substitute itself for individually named defendants" and "to claims based on harms occurring outside United States territory." Pl.'s Opp'n at 1. Indeed, based on *Sosa*'s mandate that a federal court may not maintain jurisdiction over FTCA claims based on injury arising in a foreign country, Plaintiff appears to implicitly concede that all common law claims brought on behalf of her husband, Bamaca, must fail. [3]

[3] *See, e.g .,id* ("Plaintiff...urges that *her* claims for violations of

However, Plaintiff takes a two-pronged approach in maintaining that at least some of her claims remain viable. First, Plaintiff argues that the Attorney General's March 31, 2000 Westfall certification was improper. *See* Pl.'s Opp'n at 2-11. Rather, given the "extraordinary nature" of a claim of torture, Plaintiff asserts that the acts of the individual defendants at issue were *ultra vires*; as such, it was inappropriate for the Government to assert that those actions could have fallen within the scope of the defendants' employment. *See id.* Because the United States could not properly be substituted as the sole defendant, the FTCA and its inherent limitations -- as set forth in *Sosa* -- do not apply to Plaintiff's situation. *See id.* Second, irrespective of the Westfall issue, Plaintiff contends that (1) her claims under international law -- which she now designates as claims under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 Note, *see* Pl.'s Opp'n at 1 -- and (2) claims alleging her own personal distress, suffered within the borders of the United States, survive the Supreme Court's *Sosa* decision. *See* Pl.'s Opp'n at 1; Pl.'s Surreply at 1. Upon a closer inspection, each of Plaintiff's arguments is without merit.

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international law...are not and cannot be barred by this ruling; and that *her* claim for infliction of emotional distress upon *he* survives as well")(emphasis added); Pl's Surreply at 1 ("Plaintiff would show that the defendant's responsive arguments regarding *her* international law claims and *her* claims for emotional distress must fail...")(emphasis added).

A. The Propriety of the Westfall Certification in This Action

Plaintiff first attempts to escape the Supreme Court's FTCA-related mandate in *Sosa*, which eliminated the "headquarters doctrine" and substantially bolstered the "foreign country exception," by making an end-run around the FTCA itself. That is, Plaintiff now contends that the Attorney General's March 31, 2000 Westfall certification in this case -- substituting the Government for all individual defendants -- was improper. Without the Government as the sole defendant, the FTCA would not be applicable to Plaintiff's case, and *Sosa* would no longer exist as a bar to the claims set forth in her Second Amended Complaint. In order to fully examine the merits of Plaintiff's challenge, the Court shall first review the history and parameters of the Westfall certification process, and then shall turn to an analysis of Plaintiff's specific challenge.

1. History/Parameters of the Westfall Certification Process

Following the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988), Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679). In *Westfall*, the Supreme Court held that while federal officials generally enjoy absolute immunity from state tort lawsuits for money damages, that immunity is dependent on whether their conduct was both within the scope of employment and discretionary in nature.

See Westfall, 484 U.S. at 299, 108 S. Ct. 580. The Westfall Act eliminates the "discretionary" requirement and provides that federal employees' immunity from state tort lawsuits hinges exclusively on whether they were acting within the scope of employment during the alleged incident. *See* 28 U.S.C. § 2679(b)(1); *United States v. Smith*, 499 U.S. 160, 163, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991); *Haddon v. United States*, 314 U.S. App. D.C. 369, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995).

Under the Westfall Act, an Attorney General or designee who believes that a federal employee was acting within the scope of employment at the time of the alleged incident may issue a certification to that effect. *See* 28 U.S.C. § 2679(d)(2) (certification by Attorney General); 28 C.F.R. § 15.3 (certification by designee); *Gutierrezde Martinez v. Lamagno*, 515 U.S. 417, 419, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995). A Westfall certification has two immediate consequences for a case already in federal court: (1) it requires the substitution of the United States for the federal employee(s) as the defendant(s) in the lawsuit; and (2) it converts the lawsuit into an action against the United States under the FTCA. *See* 28 U.S.C. § 2679(d)(2); *Smith*, 499 U.S. at 161-62, 111 S.C. 1180. However, while a Westfall certification is conclusive for the purposes of removal, *see* 28 U.S.C. § 2679(d)(2), such a certification is *not* conclusive regarding the substitution of the federal government. *See Lamagno*, 515 U.S. at 431-35, 115 S. Ct. 2227. That is, upon challenge or a *sua sponte* inquiry, the federal court may determine independently whether the employee acted within the scope of employment and, therefore, whether to substitute the federal

government as the proper defendant. *Id.*; *see also Haddon*, 68 F.3d at 1423; *Kimbro v. Velten*, 308 U.S. App. D.C. 134, 30 F.3d 1501, 1505 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145, 115 S. Ct. 2584, 132 L. Ed. 2d 833 (1995). Upon a challenge, the plaintiff bears the burden of producing evidence that a defendant was acting outside the scope of his employment to defeat the "*prima facie*" effect of a Westfall certification. *See Kimbro*, 30 F.3d at 1509 (citing *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994)); *Stokes v. Cross*, 356 U.S. App. D.C. 73, 327 F.3d 1210, 1215 (D.C. Cir. 2003); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 264 (D.D.C. 2004), *aff'd on other grounds*, 366 U.S. App. D.C. 408, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768, 164 L. Ed. 2d 515 (2006); *Wright v. United States*, No. 95-0274, 1996 U.S. Dist. LEXIS 21781, at *8 (D.D.C. Feb.8, 1996).

If the reviewing court determines that the employee acted *within* the scope of official duties, the employee becomes absolutely immune from actions for money damages arising from the same incident; the plaintiff's only recourse is to proceed against the federal government under the FTCA. *See* 28 U.S.C. § 2679(b)(1); *Lamagno*, 515 U.S. at 425-29, 115 S. Ct. 2227; *Haddon*, 68 F.3d at 1423. If, however, the reviewing court determines that the employee acted *outside* the scope of employment, the court must re-substitute the federal employee as the defendant. *Id.*

2. Plaintiff's Present Challenge to the March 31, 2000 Westfall Certification

Plaintiff, in her Opposition and Surreply to Defendant's Motion to Dismiss, now attempts to challenge the March 31, 2000 Westfall certification in this case. *See* Pl.'s Opp'n at 2-11; Pl.'s Surreply at 1-10. Specifically, Plaintiff claims

> that any acts of direct conspiracy, involvement, and participation in torture, as alleged in her complaint, would fall far outside the scope of the CIA's grant of authority from the United States Congress. In turn, under well settled law, such actions are automatically *ultra vires*, and can never be attributed to the government. They are, de facto, beyond the agency's power or jurisdiction. Thus the defendant officials cannot claim any sovereign immunity, and must face any and all legal consequences in their individual capacities.

Pl.'s Surreply at 2 (citing *Dugan v. Rank*, 372 U.S. 609, 621-23, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)). Plaintiff then cites a portion of the legislative history of the FTCA itself to support this interpretation, noting that the House Report states that the legislation was intended to provide

> that the United States will incur various liability only for the common law torts of its employees which are committed within the "scope of their employment." If an

> employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.

Id. at 4 (citing H.R. Rep. No. 700, 100th Cong. , 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949). As such, because the tortious act alleged as the basis of her claims -- i.e., torture -- "exceed[s] the limits of the agency' [sic] statutory delegation of power" and is so illegal as to be beyond any statutory authorization, Plaintiff claims that the Government may not properly substitute itself pursuant to the Westfall Act; that is, the individual defendants were clearly exceeding the scope of their employment in a manner that cannot be attributed to the Government and covered by the FTCA, and these defendants must remain in this suit. *See*Pl.'s Opp'n at 2, 4, 5.

As discussed below, two fundamental problems undermine Plaintiff's challenge to the March 31, 2000 Westfall certification in this case. First, Plaintiff's present challenge to the certification is now prejudicially untimely. Second, even assuming *arguendo* that such a challenge was timely and could be considered on the merits, Plaintiff misapprehends the relevant "scope-of-employment" test for the Westfall Act/FTCA. An application of the correct test, under the required examination, leads to one inexorable conclusion: the individual defendants were acting within the scope of their employment in undertaking the alleged, tortious actions and

substitution was therefore proper. Accordingly, Plaintiff's Westfall Act challenge must be rejected, the FTCA applied, and a *Sosa*-related impact analysis undertaken.

a. *Plaintiff's Westfall Challenge is Prejudically Untimely*

As a preliminary matter, Plaintiff's present Westfall Act certification challenge, raised in her present Opposition, is prejudicially untimely. In response to this issue, Plaintiff refers to pages 7-11 of her Opposition to Defendant's Supplemental Motion to Dismiss, filed on May 12, 2000. Plaintiff contends that a review of this filing establishes that "Plaintiff challenged the substitution of the United States for the CIA Defendants" almost immediately after that substitution was made, and, therefore, this "renewed" challenge cannot be prejudicially untimely as a matter of law. *See* Pl.'s Opp'n at 2 & n.4. Importantly, Plaintiff now expressly admits that "substitution into the claims for negligent supervision was not challenged by the Plaintiff," Pl.'s Surreply at 7 -- an admission that seems to indicate that Counts 20-22 of her Second Amended Complaint (her claims for negligent supervision) are no longer viable, as the Government is therefore now the sole defendant as to these claims, the FTCA applies, and *Sosa*'s interpretation on the "foreign country exception" takes hold.

However, Plaintiff continues to maintain that her May 12, 2000 Opposition brief did call into question "substitution into the claims for direct participation in and conspiracy to commit torture." *See* Pl.'s Surreply at

7 (noting that her previous brief argued, "'[t]o the extent that the government has purported to substitute the United States for the individual defendants with respect to the international law claims, that attempt fails'") (quoting Pl.'s Opp'n to Def.'s Suppl. Mot. to Dismiss at 7). [4]A review of the actual filing in question undermines Plaintiff's bold assertion that she previously challenged the validity of the Attorney General's March 31, 2000 Westfall certification. It is noteworthy that nowhere in her Opposition brief did Plaintiff challenge the *scope* of the Attorney General's certification -- i.e., whether the individual defendants were acting within the scope of their employment and could, as an initial matter, actually be substituted [**27] out of the case. *See id.* (Plaintiff, in her Surreply, basically concedes that she never previously made a scope of delegation challenge, admitting that "[t]he broader question of Congressional delegation and the scope of CIA authority was unnecessary at the time, in light of the case law then"). Rather, it is clear that in her May 12, 2000 Opposition, Plaintiff simply challenged the legal operation of the Westfall certification to have substituted the United States for the individually-named defendants as to Plaintiff's Count 28 claims under the ATCA and TVPA. *See* Pl.'s Opp'n to Def.'s Suppl. Mot. to Dismiss at 7-11. Such a challenge rested, not on the validity of the Attorney General's Westfall certification, but on the construction of 28 U.S.C. § 2679(b)(2)(B), which

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[4] Plaintiff, in a footnote in her May 12, 2000 Opposition, also noted that the Westfall certification was subject to judicial review, see Pl. Opp'n to Def's Suppl. Mot. To Dismiss at 7-8, n.9, a fact which is without contest and without particular relevance to the timeliness issue.

exempts from Westfall substitution claims brought "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." As such, Plaintiff's present gloss is specious: her reasoning is based on a failure to distinguish between a challenge to the validity of a Westfall certification (i.e., Did the Attorney General rely on the proper legal criteria in rendering the scope-of-employment determination?) and a challenge to the legal operation of that valid certification (i.e., For which claims can the United States be substituted for the individual federal defendants?). A plain review of the totality of Plaintiff's May 12, 2000 challenge indicates that Defendant was never, until now, placed on notice that Plaintiff was challenging the *validity* of the certification itself.

This time lapse -- over four (4) years between the Westfall certification and Plaintiff's present challenge -- is significant. Like the defenses of absolute and qualified immunity available to employees under a *Bivens* action, the Westfall Act confers essentially "an immunity from suit rather than a mere defense to liability" that, like the *Bivens*-related immunity, "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *see also Kim bro*, 30 F.3d at 1504 (relying upon *Mitchell*'s reasoning to hold that a pre-trial denial of Westfall Act protection is an immediately appealable final decision). Indeed, this Court noted in its March 23, 1999 Memorandum Opinion (anticipating the Government's Westfall certification), that upon forthcoming certification, "the

United States will automatically be substituted for the individual defendants." *Harbury*, 1999 U.S. Dist. LEXIS 22414, 1999 WL 33456919 at *14 (citing 28 U.S.C. § 2679(d)(1)). Since April of 2000, the individually-named federal defendants and their counsel have been operating on the basis that they are no longer defendants in this action. For the Court to entertain Plaintiff's new challenge to the scope of the Westfall certification after all of these years, and to do so based on an argument that was available -- but not raised -- by Plaintiff when the certification was initially filed, would be prejudicial indeed. Accordingly, the blatant untimeliness of Plaintiff's challenge argues in favor of a rejection of her Westfall argument.

b.*The Proper Scope-of-Employment Test*

Even assuming *arguendo* that Plaintiff's Westfall challenge was timely, a review of the merits of Plaintiff's argument reveals that her contentions are plainly in error. As noted above, the basic thrust of Plaintiff's argument is that violations of international norms, such as crimes involving torture and execution, cannot be the kinds of acts that Executive Branch officials are employed to perform; because these acts fall outside of the scope of employment, substitution of the Government via a Westfall certification is *de facto* improper. In order to analyze the persuasiveness of Plaintiff's argument, it is first necessary to locate and set forth the relevant "scope-of-employment" test.

To determine whether a federal employee was acting within the scope of his or her employment, a federal court must apply the law of the state where the tortious

act occurred. *See Tarpeh-Doe v. United States*, 307 U.S. App. D.C. 253, 28 F.3d 120, 123 (D.C. Cir. 1994); *Garber v. United States*, 188 U.S. App. D.C. 172, 578 F.2d 414, 415 (D.C. Cir. 1978). Given that the critical decisions, employee instructions, and job assignments, as alleged by Plaintiff, emanated from the CIA (located in Langley, Virginia), the State Department (located in Washington, D.C.), and the NSC (located in Washington, D.C.), the Court must apply both Virginia and District of Columbia law in determining the proper framework under which to analyze scope-of-employment issues. Both jurisdictions look to the Restatement (Second) of Agency as the proper framework for determining whether an employee acted within the scope-of-employment. *See Haddon*, 68 F.3d at 1423-24; *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 32 (D.D.C. 2006); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995); *Newport News Indus. v. Dynamic Testing, Inc.*, 130 F. Supp. 2d 745, 749-50 (E.D. Va. 2001). The Restatement provides:

> [c]onduct of a servant is within the scope of employment if, but only if: (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Restatement (Second) of Agency §228 (1958).

As a threshold matter, Plaintiff argues that this scope-of-employment test is fundamentally inapplicable to this situation, *see* Pl.'s Surreply at 4, as torture is clearly in violation of, *inter alia*, the Fourth Hague Convention, the Geneva Convention, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture, the Torture Victim Protection Act, and the CIA's own mandate, *see* Pl.'s Opp'n at 7-10. Such an argument is unavailing for three reasons. *See Rasul*, 414 F. Supp. 2d at 32 n.5. First, in a passage overlooked by Plaintiff, Congress, through the FTCA, established a framework where state law, not State Department representations to the United Nations or international treaties, governs the scope-of-employment determination. *See* H.R. Rep. No. 700, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 ("Under the FTCA, the issue of whether an employee was acting within the scope of his employment is governed by the law of the state in which the negligent or wrongful conduct occurred."). Second, to the extent that the Executive Branch can make legal representations to this Court regarding the scope of an employee's conduct, the Government has done so through its March 31, 2000 Westfall certification. *See Lamagno*, 515 U.S. at 434, 115 S. Ct. 2227. Third, and finally, "[d]efining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss." *Schneider*, 310 F. Supp. 2d at 265 (emphasis in original); *Rasul*, 414 F. Supp. 2d at 32 n.5; *cf. Ramey v. Bowsher*, 286 U.S. App. D.C. 288, 915 F.2d 731, 734 (D.C. Cir. 1990)

("We reject appellant's argument that the tortious acts are unlawful *per se* and therefore cannot be considered [] within the outer limits of the official's duties."); *Martin v. D.C. Metro. Police Dep't*, 259 U.S. App. D.C. 31, 812 F.2d 1425, 1429 (D.C. Cir. 1987) ("No government officer, of course, can be 'authorized' to act unlawfully. But if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be 'completely abrogate[d].'") (citation omitted). Accordingly, as long-established within this Circuit, *see Haddon*, 68 F.3d at 1423-24; *Kimbro*, 30 F.3d at 1506, the Court shall apply the principles set forth in the Restatement (Second) of Agency to determine whether the acts alleged in Plaintiff's Second Amended Complaint fall within the scope of the individual defendants' employment, thereby allowing Westfall certification and the application of the FTCA.

c. *Application of the Scope-of-Employment Test*

Pursuant to the applicable scope-of-employment test, the Court shall look at (1) the nature of the conduct at issue; (2) space and time limitations; (3) the purpose of the conduct; and (4) the foreseeability of the conduct to determine whether the Government's March 31, 2000 Westfall certification and contemporaneous substitution was proper in this case. *See* Restatement (Second) of Agency § 228 (1958). Because Plaintiff does not challenge the conduct based on whether it took place within the space and time limitations authorized by the employer, the Court shall first set forth the

standards governing the nature and foreseeability of the conduct at issue (thereby melding criteria # 1 and # 4, as seems logical under the test) and then outline the standards governing the purpose of the conduct at issue. *See Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986) (essentially making the inquiry two-part, the first prong looking at whether the employee was at least partially motivated to further the employer's interests, and the second prong focusing on whether the employees conduct was "of the kind he was employed to perform"). Once the relevant criteria have been outlined, the Court shall then analyze the actions alleged in Plaintiff's Second Amended Complaint in light of the governing benchmarks. An analysis of these principles in light of the facts alleged in Plaintiff's Second Amended Complaint reveals that the Government's action in moving forward with the March 31, 2000 Westfall certification was entirely proper.

i. Nature of the Conduct/Foreseeability

To qualify as conduct of the kind within the scope of one's employment, the conduct must either have been "of the same general nature as that authorized" or "incidental to the conduct authorized." Restatement (Second) of Agency § 229 (1958); *Haddon*, 68 F.3d at 1424. The District of Columbia "liberally construes the doctrine of respondeat superior . . . with respect to the first prong of the Restatement (Second) of Agency § 228(1)." *Stokes*,327 F.3d at 1216 (citing *Haddon*, 68 F.3d at 1425-26; *Weinberg*, 518 A.2d at 988-90).

> [C]onduct is "incidental" to an employee's legitimate duties if it is "foreseeable."

> "Foreseeable" in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees. To be foreseeable, the torts must be "a direct outgrowth of the employee's instructions or job assignment." It is not enough that an employee's job provides an "opportunity" to commit an intentional tort.

Haddon, 68 F.3d at 1424 (citations omitted).

" The courts in the District of Columbia categorize practically any conduct as falling within the scope of, or incidental to, that authorized by their employer so long as the action has some nexus to the action authorized." *Rasul*, 414 F. Supp. 2d at 33. For example, in *Lyon v. Carey*, 174 U.S. App. D.C. 422, 533 F.2d 649 (D.C. Cir. 1976), the D.C. Circuit upheld a jury verdict that a mattress deliveryman acted within the scope of his employment when he assaulted and raped the plaintiff immediately following a dispute over whether he should carry the mattress into the apartment for her inspection and whether a check was an acceptable means of payment. The *Lyon* court emphasized that "[t]he dispute arose out of the very transaction which had brought [the deliveryman] to the premises," and observed that the assault "arose naturally and immediately between [the deliveryman] and the plaintiff about two items of great significance in connection with his job[:] the request of the plaintiff . . .

to inspect the mattress and springs before payment . . . and [the deliveryman's] insistence on getting cash rather than a check." *Id.* at 652. Moreover, in *Johnson v. Weinberg*, 434 A.2d 404 (D.C. 1981), the D.C. Court of Appeals similarly ruled that a laundromat could be liable for injuries inflicted when an employee responsible for removing clothes from washing machines shot a customer during a dispute involving missing shirts. Because "[t]he assault arose out of the transaction which initially brought [the customer] to the premises . . . and was triggered by a dispute over the conduct of the employer's business," the court held that the jury could find the shooting incidental to the employment. *Id.* at 409. Virginia follows a similar analysis, finding actions to be within the scope of employment so long as at least some nexus exists. *See, e.g., Martin*, 48 F.3d at 1352 (company liable for assaults undertaken by its general manager where the "assaults took place in the workplace, during working hours, on an employee whom he had authority to hire, fire, promote, and discipline" and therefore "arose out of [the manager's] management of the hotel").

As such, the relevant "inquiry is necessarily whether the intentional tort was foreseeable, or whether it was 'unexpectable in view of the duties of the servant.'" *Majano v. Kim*, 2005 U.S. Dist. LEXIS 6562, No. Civ. A 04-201, 2005 WL 839546, at *8 (D.D.C. Apr. 11, 2005) (quoting Restatement (Second) of Agency § 245). "[A] broad range of intentional tortious conduct has been found to be within the scope of employment despite the violence by which injury was inflicted," *id.*, and employers may be held liable for "foreseeable altercations [that] may precipitate violence . . . even

though the particular type of violence was not in itself anticipated or foreseeable," *Lyon*, 533 F.2d at 651.

ii. Purpose of the Conduct

In addition to looking at the nature and foreseeability of the conduct at issue, the Court must also address whether the alleged actions were perpetuated, at least in part, for the purpose of serving the master. *See* Restatement (Second) of Agency § 228. "[W]here the employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests." *Weinberg*, 518 A.2d at 989 (citation omitted). The D.C. Circuit has stressed the idea that "[t]he intent criterion focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace *any intentional tort* arising out of a dispute that 'was originally undertaken on the employer's behalf.'" *Stokes*, 327 F.3d at 1216 (quoting *Weinberg*, 518 A.2d at 992) (emphasis added). Finally, "[t]he employer does not avoid liability for the employee's intentional torts . . . if the tort is committed partially because of a personal motive, such as revenge, as long as 'the employee [is] actuated, at least in part, by a desire to serve his principal's interest.'" *Weinberg*, 518 A.2d at 988 (citing *Jordan v. Medley*, 228 U.S. App. D.C. 425, 711 F.2d 211, 214 (D.C. Cir. 1983); Restatement (Second) of Agency §245 cmt.f (1958)).

iii. Analysis of the Relevant Standards

Importantly, the National Security Act of 1947 provides, *inter alia*, that the Director of Intelligence

is to gather and provide all national intelligence in a manner that is "timely, objective, independent of political considerations, and based on all sources available to the intelligence community and other entities." 50 U.S.C. § 403-1(a)(2); *see also id.* § 403-4a(d)(1) ("The Director of the Central Intelligence Agency shall collect intelligence through human sources and by other appropriate means . . . ."). A review of the allegations made in Plaintiff's Second Amended Complaint strongly supports the conclusion that the subject conduct was undertaken, not for personal benefit, but was foreseeable action conducted for the purpose of gathering information and intelligence from Bamaca -- i.e., conduct which falls under the very mission of the CIA. For instance, Plaintiff, in her Second Amended Complaint, alleges, *inter alia*:

> . "[P]aid CIA agents were hired by the CIA for the purpose of, among other things, obtaining information about the URNG." Pl.'s Second Am. Compl. P 43. "[I]t was understood by the CIA that this information would be obtained through torture and similar means." *Id.*
>
> . "Defendants knowingly paid substantial sums to the CIA's Guatemalan agents or 'assets' who secretly imprisoned, tortured and extrajudicially murdered Mr. Bamaca in order to obtain information from Mr. Bamaca that was sought by the CIA." *Id.* P.46.

. "Defendant CIA has a long-standing policy, pattern or practice of extracting information through severe torture that often results in death, of purchasing information that the CIA knows is being extracted through torture and the threat of extrajudicial execution." *Id.* P 93.

. "Defendant CIA maintains a policy, pattern or practice of extracting information through the imprisonment and/or severe torture of individuals who may possess information that the CIA . . . may deem valuable that often results in their death." *Id.* PP 104, 113, 126.

. "Defendant CIA maintains a policy, pattern or practice of purchasing information that its officials, employees and/or agents know or should know is being extracted through secret imprisonment, torture, and threat of extrajudicial execution of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable." *Id.* PP 108, 114, 131.

. "The CIA Defendants adhered to this policy, pattern or practice when they conspired with and/or directed Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and/or extrajudicially executed

Mr. Bamaca as part of their effort to obtain information sought by the CIA [D]efendants." *Id.* PP 109, 132.

. "This false imprisonment of Bamaca was caused by the CIA Defendants' negligent supervision of Alpirez and/or others whom they had hired to extract information from Bamaca." *Id.* PP 205, 210.

. "The CIA Defendants should have foreseen that Bamaca might be subjected to false imprisonment because they knew or should have know that Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information . . . ." *Id.* PP 206, 211.

. "The wrongful death of Bamaca was caused by the CIA Defendants' negligent supervision of Alpirez and/or others whom they had hired to extract information from Bamaca." *Id.* P 215.

Taken as true, the allegations made by Plaintiff in her Second Amended Complaint reveals that the tortious conduct at issue -- i.e., torture and extrajudicial execution -- by alleged CIA agents was a direct outgrowth of their instructions or job assignment. That is, the conduct was either "of the same general nature as that authorized," Restatement (Second) of Agency §

229, *see* Pl.'s Second Am. Compl. PP 104, 113, 126 ("Defendant CIA maintains a policy, pattern or practice of extracting information through the imprisonment and/or severe torture of individuals who may possess information that the CIA . . . may deem valuable that often results in their death."), or was, at the very least, "incidental to the conduct authorized," Restatement (Second) of Agency § 229 -- i.e., the collection of intelligence from human sources, *see* Pl.'s Second Am. Compl. P 46 ("Defendants knowingly paid substantial sums to the CIA's Guatemalan agents or 'assets' who secretly imprisoned, tortured and extrajudicially murdered Mr. Bamaca in order to obtain information from Mr. Bamaca that was sought by the CIA."). The fact that torture could be used and/or an extrajudicial execution employed was clearly foreseeable, according to Plaintiff herself. *See id.* PP 206, 211 ("The CIA Defendants should have foreseen that Bamaca might be subjected to false imprisonment because they knew or should have know that Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information . . . .").

Moreover, Plaintiff's allegations of torture and extrajudicial execution, though clearly reprehensible, do not offset the presumption that the former individual defendants were acting on behalf of their employer(s) during "the course of performing job duties." *Weinberg*, 518 A.2d at 989; *see* Pl.'s Second Am. Compl. PP 109, 132 ("The CIA Defendants adhered to this policy, pattern or practice when they conspired with and/or directed Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned,

tortured and/or extrajudicially executed Mr. Bamaca as part of their effort to obtain information sought by the CIA [D]efendants."). Plaintiff has proffered no evidence that would lead this Court to believe that the former individual defendants and CIA agents at issue had any motive divorced from collecting intelligence and aiding the defeat of the Marxist Guatemalan resistance movement (and therefore advancing the policy of the United States at that time). *Id.* at 990 (excluding actions committed solely for the servant's own purposes from the scope of employment).

As such, the Court is faced with a situation where -- based on the very allegations made in Plaintiff's Second Amended Complaint -- the former individual defendants were clearly undertaking foreseeable conduct authorized by the CIA and other Executive Branch agencies or clearly incidental to such authorization. The conduct was plainly intended, at least in part, to further the interests of the employer at issue -- i.e., the United States. Accordingly, the conduct at issue in Plaintiff's suit falls within the actors' "scope-of-employment," as set out in the Restatement (Second) of Agency § 228. With this conclusion, the Court is not sanctioning the alleged conduct at issue, torture, but determining who is to be held responsible for it -- the employee individually or the United States. Such a conclusion is consistent with similar determinations made by other courts within this jurisdiction. *See, e.g., Rasul*, 414 F. Supp. 2d at 30-39 (concluding that substitution of the United States for individual defendants pursuant to Westfall certification was proper, despite allegations that individual defendants -- who were prison guards at Guatanamo Bay -- tortured

plaintiff detainees); *Schneider, 310 F. Supp. 2d at 264-66 (concluding that* the United States was properly substituted for individual defendant Henry Kissinger, despite allegations that he conspired to kidnap the Commander-in-Chief of the Chilean army, which led to his death); *Gonzalez-Vera v. Kissing er*, Civ. No. 02-2240, at 10-14 (HHK) (D.D.C. Sept. 17, 2004) (finding that United States was correctly substituted for individual defendant Henry Kissinger despite allegations that Kissinger assisted and condoned torture undertaken by the regime of General Augusto Pinochet), *aff'd on other grounds*, 371 U.S. App. D.C. 242, 449 F.3d 1260 (D.C. Cir. 2006).

Given that the actions undertaken by the former individual defendants named by Plaintiff fell within the scope of their employment, the Attorney General's March 31, 2000 Westfall certification was plainly appropriate. Accordingly, as emphasized by the Government, the FTCA governs Plaintiff's suit. *See* 28 U.S.C. § 2679(b)(1) . Because the underlying conduct at issue -- i.e., the capture, torture, and extrajudicial killing of Bamaca, Plaintiff's husband -- occurred exclusively within the borders of Guatemala, the "foreign country exception" applies. *See* 28 U.S.C. § 2680(k). Given the abrogation of *Sami* and the "headquarters doctrine," which might have saved Plaintiff's claims under the theory that the planning of the scheme took place within the United States, and the fact that the actions in Guatemala are most naturally understood as the kernel of a "claim arising in a foreign country," Plaintiff's suit is barred under the FTCA's "foreign country exception" to the waiver of sovereign immunity. *See Sosa*, 542 U.S. at 700-01, 711,

124 S.Ct. 2739.

B. Plaintiff's Attempt to Avoid the Immunity Created by the FTCA's "Foreign Country Exception" Through Resort to International Law and Other Statutes Such as the ATCA and TVPA Fails.

In an attempt to avoid the implications of the Westfall certification, the FTCA, and the parameters of the "foreign country exception" as clarified in *Sosa*, Plaintiff looks to Count 28 of her Second Amended Complaint, which contends that

> [b]y participating and/or collaborating in the disappearance, prolonged arbitrary detention, torture, extrajudicial execution, and cruel, inhuman or degrading treatment of Mr. Bamaca, and/or conspiring or collaborating with and/or directing others who committed such acts, the CIA Defendants violated international law, including the law of war, the law of the United States, and the laws of the District of Columbia, Virginia, and Guatemala.

Pl.'s Second Am. Compl. P 242; *see also* Pl.'s Submission of Detailed Stmt. re: Count 28 at 1-7.[5] In addition to her emphasis on international law, Plaintiff

[5] Because the Court has concluded that sovereign immunity applies due to the fact that the individual defendants were acting within the scope of their employment, Plaintiff's effort in count 28 to invoke the tort laws of the District of Columbia and Virginia must fail. *See, supra,* Section III(A).

specifically points to two statutes that she claims are encompassed by Count 28 and are unaffected by *Sosa*: (1) the ATCA, and (2) the TVPA. *See* Pl.'s Opp'n at 11-16. Plaintiff contends that the existence of her ATCA and TVPA-related claims against the individual defendants ensures that at least a portion of her suit remains uncovered by the FTCA and therefore cannot be dismissed in full. *Id.* Upon a review, it is clear that Plaintiff's attempted refuge against the individual defendants under international law, the ATCA, and the TVPA is improper and without] merit.

1. International Law

First, Plaintiff -- in Count 28 and in her Opposition -- appears to invoke international law as a basis to continue her suit against the former individual defendants and avoid Westfall certification as it applies to Count 28. Indeed, Plaintiff stresses in her Opposition that "the cause of action based on clear and universal international customary law remains valid." Pl.'s Opp'n at 13. To the extent that Plaintiff's reasoning can be read to suggest that Westfall Act substitution can be defeated on grounds that violations of "clear and universal international customary law" somehow provide this Court with "arising under" jurisdiction pursuant to 28 U.S.C. § 1331 , Plaintiff's claim is misplaced.

Importantly even if a federal employee is determined to have acted within the scope of his or her employment, he or she is not immune from a money-damages suit if one of the two exceptions to the Westfall Act applies.

Congress preserved a federal employee's individual liability for "a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A), or "a violation of a statute of the United States under which such action against an individual is otherwise authorized," *id.* § 2679 (b)(2)(B). International law, however characterized (i.e., the law of nations, federal common law), falls outside of these clearly enumerated exceptions. As such, an alleged violation of international law cannot prevent a Westfall Act certification from applying. *See Rasul*, 414 F. Supp. 2d at 38; *Schneider*, 310 F. Supp. 2d at 267; *Gonzalez-Vera*, Civ. No. 02-22 40 (HHK), at 14 n.13 (D.D.C. Sept. 17, 2004). Indeed, the Supreme Court in *Sosa* specifically warned against allowing private causes-of-action for violations of international law, emphasizing that courts should consider "the potential implications for the foreign relations of the United States . . . [and be] wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727, 124 S. Ct. 2739. Moreover, Plaintiff cannot use 28 U.S.C. § 1331 as the basis for a suit claiming a violation of international law, as Section 1331 merely confers federal question jurisdiction, rather than creating any kind of cause-of-action for international law violations. *Id.*

2. The Alien Tort Claims Act

As noted above, Plaintiff also contends that her "Alien Torts Claims Act claim" contained within Count 28 against the individually-named defendants in her Second Amended Complaint survives *Sosa* and its gloss on the FTCA's "foreign country exception." According to

Plaintiff, "it is clear that the *Sosa* case in no way negates Plaintiff's ATCA claim for violation of international law based upon the torture of her husband. As there is no sovereign immunity to acts of torture, which are beyond the CIA's authority, there is no bar created by the *Sosa* ruling on the FTCA headquarters exception." Pl.'s Opp'n at 13. Based on these ATCA-related assertions, Plaintiff concludes that "the defendants' motion to dismiss this claim must fail." *Id.*

The ATCA, in pertinent part, provides, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws or nations or a treaty of the United States." 28 U.S.C. § 1350. A plain reading of this statute in conjunction with its subsequent judicial interpretation reveals two key problems that undermine Plaintiff's attempted invocation of the ATCA to avoid Westfall certification, the application of the FTCA, and ultimately, dismissal.

First, "Plaintiff Jennifer Kristina Harbury is a United States citizen . . . and a resident of the District of Columbia." Pl.'s Second Am. Compl. P 9. Plaintiff is not an "alien" and is therefore clearly unable to use the ATCA as the basis for *her* claims. As noted previously, to the extent that her Second Amended Complaint stated claims on behalf of her husband in Counts 18-22 and 28 that could fall within the ATCA, Plaintiff appears to have conceded Westfall certification and the application of *Sosa* as to these claims. *See supra* n.3 (citing Pl.'s Opp'n at 1 ("Plaintiff . . . urges that *her* claims for violations of intentional law . . . are not and

cannot be barred by this ruling; and that *her* claim for infliction of emotional distress upon *her* survives as well") (emphasis added); Pl.'s Surreply at 1 ("Plaintiff would show that the Defendants' responsive arguments regarding *her* international law claims and *her* claims for emotional distress must fail . . . .") (emphasis added)). Given that Plaintiff lacks standing to bring an ATCA claim and has apparently already conceded Westfall certification as to any of her husband's claims, Plaintiff's attempted invocation of the ATCA appears without foundation.

Second, even assuming *arguendo* that Plaintiff could invoke the ATCA on behalf of herself or her husband's estate, the ATCA would not fall within an exception to immunity under the Westfall Act. Simply, the ATCA cannot be the subject of "a violation" of a federal statute because the ATCA provides no substantive rights that could be the subject of any claimed violation. As the Supreme Court noted in *Sosa*, the ATCA is a "jurisdictional grant . . . best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" that the ATCA was enacted in 1789. *Sosa*, 542 U.S. at 724, 124 S. Ct. 2739. As the *Rasul* court correctly reasoned,

> [t]he plain language of the ATCA . . . does not confer rights nor does it impose obligations or duties that, if violated, would trigger the Westfall Act's statutory exception. For the Westfall Act's statutory exception to apply, the ATCA would have

> to create substantive rights or duties that can be violated for the purposes of the Westfall Act.

Rasul, 414 F. Supp. 2d at 38 (citing *Schneider*, 310 F. Supp. 2d at 266 (noting that the ATCA cannot be violated for the purposes of § 2679(b)(2)(B)); *see also Gonzalez-Vera*, Civ. No. 02-2240 (HHK), at 15-16 (D.D.C. Sept. 17, 2004) (same). Because the ATCA grants no rights to aliens, but simply provides the federal courts with jurisdiction to adjudicate rights conferred elsewhere, the ATCA fails to add Plaintiff in her attempt to satisfy the Westfall Act exception embodied in 28 U.S.C. § 2679(b)(2)(B).

3. The Torture Victim Protection Act

Finally, Plaintiff seeks refuge from the exclusivity of the Westfall certification and the substitution of the United States as the sole defendant by turning to the Torture Victim Protection Act, which she claims would fall under the Section 2679(b)(2)(B) exception; indeed, Plaintiff contends that her "claim under the Torture Victim Protection Act" is unaffected by *Sosa*. Pl.'s Opp'n at 13. Plaintiff's TVPA argument is without merit for two reasons: (1) Plaintiff's claim is untimely, and (2) even assuming *arguendo* that Plaintiff's claim was timely and did fall within the parameters of her Second Amended Complaint, the TVPA would not have afforded Plaintiff a cause-of-action in this case.

a. *Plaintiff's New-Found TVPA Claim is Prejudicially Untimely*

Importantly, a review of Plaintiff's original Complaint, her First Amended Complaint, her operative Second Amended Complaint, and her proposed/rejected Third Amended Complaint (prepared four months after the Court ordered Plaintiff to clarify her international law claims as intended to be asserted in Count 28) reveals one basic truth: nowhere does Plaintiff ever assert an independent TVPA claim against the individually-named federal defendants. Indeed, the "TVPA" itself is never explicitly mentioned. Faced with this truth, Plaintiff directs both the Court and Defendant to look at her "Submission of a More Detailed Statement Regarding Count 28 of Her Complaint" filed on April 19, 1999. *See* Pl.'s Surreply at 10. Plaintiff asserts, not that her April 19, 1999 submission was an incomplete description of her international law claims under Count 28, but instead that the April 19, 1999 submission embodied a "full explanation" of those claims. *Id.* She states that she "specifically discussed" in that submission "the TVPA claim in detail." *Id.*

A review of Plaintiff's April 19, 1999 submission, *see* Pl.'s Submission of Detailed Stmt. re: Count 28 at 1-7, contains one -- and only one -- reference to the TVPA. On page 2, footnote 2 of the document, Plaintiff in a "see also" citation references the TVPA in an attempt to define the meaning of "extrajudicial execution." *See id.* at 2 n.2. Nowhere else does Plaintiff cite the TVPA, claim that she or her husband's estate has a cause-of-action emanating from that statute, or otherwise attempt to make an argument based on its provisions. Plaintiff has never sought to amend her Second Amended Complaint to include a claim based on a violation of the TVPA (even her proposed Third

Amended Complaint was silent as to such a claim) -- not even after she filed her Opposition brief as to Defendant's present motion. As such, it is clear that Defendant, or the individually-named former federal defendants, never had any explicit notice that Plaintiff was asserting an independent TVPA-based claim.

Nor could such notice have been implied somehow from Plaintiff's vague and diffuse pleadings and/or previous arguments. That is, when Plaintiff asserted that she was generally suing the individually-named defendants for violations of international law, or after her April 19, 1999 submission, the individual federal defendants would have had no notice or even a reasonable basis to believe that they were being sued for the violation of a federal statute entitled the TVPA. Importantly, the TVPA is a *federal* statute, enacted in 1992 to amend the ATCA to provide civil liability for torture or extrajudicial killing carried out by an individual "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Plaintiff argues, without citation to any legal authority, that "the legislative history and contents of the [TVPA] make clear [that] the statute is very much based upon international law." Pl.'s Surreply at 10. However, a plaintiff suing an individual federal employee for violating a federal statute must place that defendant on notice as to the nature of the claim. Plaintiff told these individually-named federal defendants that she was suing them, in pertinent part, under "international law." Such a reference simply is not fair notice that she was suing these defendants under a federal statute incorporating *foreign* law. The fact that Plaintiff herself

may have considered the TVPA to be a source of *international* law does not suffice to have placed the individually-named defendants on notice that she was suing them for violation of that federal statute -- i.e., the TVPA. Moreover, even assuming that *international* law formed the basis of some of the legislative history of the TVPA, that fact alone would provide insufficient notice: simply, a defendant is not required to understand the legislative history of every potential statute under which he or she could conceivably be sued; rather, it is the task of the plaintiff to specify what statutes and laws are the precise bases for his or her claims against a defendant, not the other way around. This would be true even if the TVPA actually incorporated *international law* (as claimed by Plaintiff), rather than *foreign* law, as the rule of decision.

Ultimately, Plaintiff cannot plead a claim for money damages against long-substituted, individually-named former federal defendants in an Opposition to a Motion to Dismiss filed eight (8) years after her original Complaint. Plaintiff has attempted to turn her Second Amended Complaint into a moving target, and unfairly so. Given that the individual federal defendants had no notice, or even a reasonable basis to believe, that they were being sued for a violation of the TVPA at any point in this lawsuit prior to Plaintiff's present Opposition, the Court finds that Plaintiff's attempted *sub rosa* amendment to her Second Amended Complaint Count 28 must fail. There has never been a TVPA claim pled in this case, and the Court shall not deem that one now exists. Given that Plaintiff's imposition of a TVPA-related argument is prejudicially untimely, such a claim should be rejected outright.

b. *The TVPA Would Not Afford Plaintiff a Cause-of-Action*

Even assuming *arguendo* that Plaintiff had properly set out and put the individually-named federal defendants on notice of a TVPA claim, such a claim would be subject to dismissal. Upon an analysis of the merits of a TVPA-based argument in this case, two problems that undermine any TVPA claim that Plaintiff could set forth become immediately apparent. First, Section 2(b) of the TVPA would act to bar Plaintiff's claim. Section 2(b) provides: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b). Congress enacted this requirement to "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred," under the theory that this requirement "will also avoid exposing U.S. courts to unnecessary burdens," and "to encourage the development of meaningful remedies in other countries." *See* H.R. Rep. No. 102-367(I), at 5, *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88. Here, Plaintiff has neither alleged nor established that she has ever pursued and/or exhausted her remedies against her husband's alleged torturers in the place in which the conduct giving rise to the claim occurred -- i.e., Guatemala.

Second, as noted above the TVPA imposes civil liability only on an individual acting "under actual or apparent authority, or color of law, of any *foreign* nation." TVPA

§ 2(a) (emphasis added). At the time of the TVPA's signing, the "under foreign color of law" requirement was understood to serve as an important limitation of the Act that would preclude its application to United States operations abroad. As President George H.W. Bush noted upon its March 16, 1992 signing:

> Finally, I must note that I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. Because the Act permits suits based only on actions "under actual or apparent authority, or color of law, of any foreign nation," I do [**63] not believe it is the Congress' intent that [the TVPA] should apply to United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law.

Stmt. by Pres. George H.W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992). Indeed, President Bush further emphasized that "[t]his legislation concerns acts of torture and extrajudicial killing committed overseas by *foreign* individuals." *Id.* (emphasis added). As President Bush recognized, a different reading of the law would expose every federal employee working abroad daily with employees of foreign governments -- i.e. employees in intelligence agencies, military agencies, diplomatic and foreign aid agencies, and law enforcement agencies -- to personal

liability under the construct that they were somehow actually or apparently acting under foreign law.

Accordingly the plain language of the TVPA limits liability to those acting under color of law of a foreign nation. *See White v. Paulsen*, 997 F. Supp. 1380, 1385 n.1 (E.D. Wa. 1998) ("On its face, the right of action created by the Torture Victim Protection Act is limited to conduct taken under color of law of a 'foreign' nation."). The legislative history refers to torture or extrajudicial killing committed by foreign actors rather than domestic ones. *See, e.g.*, H.R. Rep. No. 102-367(I), at 3-4, *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("[T]he TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."); *id.* at 4, *reprinted in* 1992 U.S.C.C.A.N. 84, 87 ("[O]nly 'individuals,' not foreign states, can be sued under the bill."); *id.* at 5, *reprinted in* 1992 U.S.C.C.A.N. 84, 88 ("The TVPA is subject to the restrictions in the Foreign Sovereign Immunities Act of 1976.").

Here, to find that the individually-named federal defendants acted under color of foreign law, the Court would be required to conclude that these individuals, employed by the United States, acted as agents of the Guatemalan government while serving the CIA in its collection of intelligence "through human sources and by other appropriate means," 50 U.S.C. § 403-4a(d)(1); this would be "a far fetched proposition at best and, more importantly and significantly, one that was not alleged in [P]laintiff[']s complaint. " *Gonzalez-Vera*, Civ. No. 02-2240 (HHK), at 17 (D.D.C. Sept. 17, 2004). As this Court discussed previously, *see supra* Section III(A), the alleged actions undertaken by the individual

CIA defendants were clearly within the scope of their employment serving the United States. These alleged actions taken by the individual CIA defendants carrying out the policies and directives of the CIA to obtain intelligence for the United States' benefit were therefore undertaken under color of United States law -- not "under actual or apparent authority, or color of law of any foreign nation." Indeed, none of the allegations within the Second Amended Complaint supports the existence of an agency relationship between the named individual defendants and Guatemala. *See* Restatement (Second) of Agency § 15 (1958) ("[o]ne becomes an agent only if another in some way indicates to him consent that he may act on the other's account" and the agent consents to the agency relationship). Moreover, Plaintiff has failed to cite a single case that stands for the principle that a U.S. agent serving the interests of the United States and acting within his or her employment can be held liable pursuant to the TVPA. Rather, all relevant decisions point to the conclusion that such liability pursuant to the TVPA cannot attach to U.S. agents. *See, e.g., Schneider*, 310 F. Supp. 2d at 267 ("In carrying out the direct orders of the President of the United States, . . . Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."); *Gonzalez-Vera*, Civ. No. 02-2240 (HHK), at 17-21 (D.D.C. Sept. 17, 2004) (same).

Plaintiff attempts to avoid this quandary by analogizing to 42 U.S.C § 1983, using its "color of state law" test to argue that mere joint participation of Guatemalan military officials and individual CIA

defendants in their alleged effort to obtain intelligence from Bamaca would render the individually-named federal defendants as acting under color of Guatemalan law. *See* Pl.'s Surreply at 12-14. However, " Section 1983 does not apply to federal officials acting under color of federal law." *Settles v. U.S. Parole Comm'n*, 368 U.S. App. D.C. 297, 429 F.3d 1098, 1104 (D.C. Cir. 2005.). That is, if a federal official acts pursuant to his or her federal authority, it is not deemed an act taken under color of state law. *See Williams v. United States*, 364 U.S. App. D.C. 382, 396 F.3d 412, 415 (D.C. Cir. 2005) (arrestee could not bring Section 1983 action against an officer employed by the U.S. Government Printing Office despite argument that D.C. officials conspired with the federal official because the officer was a federal official, not a D.C. official; only the federal government gave him power to make arrests for violations of D.C. law; the District of Columbia did not have authority over him and did not "exercise . . . coercive power" through him; and D.C. officials had minimal involvement in the incident); *see also Strickland v. Shalala*, 123 F.3d 863, 866 (6th Cir. 1997) ("Because federal officials typically act under color of federal law, they are rarely subject to liability under § 1983.").

Even where courts have found that a federal official, acting under color of federal law, can possibly be deemed to act under color of state law if he or she conspires or acts in concert with state officials, *see Strickland*, 123 F.3d at 866 (collecting cases), these courts have generally held that there is no "state action" under Section 1983 unless there has been a misuse of power "possessed by virtue of state law and

made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)). Here, there is no valid claim that the individually-named CIA defendants possessed authority by virtue of the laws of Guatemala, or that they were somehow "clothed with the authority of" Guatemalan law despite their employment by the United States. Rather, the allegations of the Second Amended Complaint demonstrate that these individual defendants were acting within the scope of their federal employment pursuant to the National Security Act of 1947 to gather intelligence for the United States. At all times, these former defendants were "clothed with the authority" of federal law. As such, even leaving aside the clear intent of both Congress and President Bush at the time of the TVPA's enactment, the basic, explicit limitations of the TVPA itself, and persuasive precedent arguing against applying the TVPA to officials of the United States, even an application of Section 1983-style reasoning would undermine Plaintiff's belated TVPA claim. Accordingly, even assuming *arguendo* that Plaintiff's TVPA claim was not prejudicially untimely, Plaintiff's attempt to avoid *Sosa* and the strictures of the FTCA through the TVPA is without foundation.

C. Plaintiff's Tort Claims to Recover for Her Own Personal Distress Based on Her Husband's Alleged Detention, Torture, and Execution in Guatemala are Entirely Derivative of Claims Arising in Guatemala and Must Be Dismissed.

As repeatedly noted above, Plaintiff's action is "most naturally understood as the kernel of a claim arising in a foreign country," *Sosa*, 542 U.S. at 701, 124 S. Ct. 2739 -- i.e., Guatemala. All of Plaintiff's counts that remained at the outset of Defendant's current Motion to Dismiss are based on injuries suffered by her husband in Guatemala. *See, e.g.*, Counts 18-19 (based on the alleged "imprisonment, torture, and extrajudicial execution" of Bamaca in Guatemala); Count 20 (based on the false imprisonment of Bamaca in Guatemala); Count 21 (based on the assault and battery of Bamaca in Guatemala); Count 22 (based on the wrongful death of Bamaca in Guatemala); Count 28 (based on the alleged abusive treatment that Bamaca received in Guatemala). Insofar as Plaintiff claims that she suffered emotional distress (Counts 18-19, 28), physical distress (Count 28), and the loss of spousal companionship (Count 28) in some unidentified state in the United States,[6] Plaintiff's personal claims are entirely derivative of claims "based on . . . injury suffered in a foreign country." *Sosa*, 542 U.S. at 701, 124 S.Ct. 2739.

Importantly, the viability of such derivative claims are commensurate only with the viability of the primary claim. *See, e.g., Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 359, 116 Fed. Appx. 638 (6th Cir.

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[6] Plaintiff, in her Second Amended Complaint, alleges that she is a resident of the District of Columbia, see Pl.'s Second Am. Compl. ¶ , but in her Surreply notes that (1) she was a resident of the States of Texas "[a]t the time of her husband's capture in 1992...and remained so for most of the period he was still alive"; and (2) she became a resident of Massachusetts in 2003. See Pl.'s Surreply at 15-16.

2004) loss of consortium claim "is derivative and thus stands or falls on the primary claims in the complaint") (citations and internal quotation marks omitted); *St. John v. Int'l Ass'n of Machinists Aerospace Workers, Local # 1010, Dist. # 118, Local Lodge No. 254*, 139 F.3d 1214, 1217 n.1 (8th Cir. 1998) (wife's "loss of consortium claim is derivative of her husband's claims and will not survive to the extent [the husband's] underlying claims are preempted"); *Murray v. Commercial Union Ins. Co.*, 782 F.2d 432, 438 (3d Cir. 1996) (same); *cf. Skees v. United States*, 107 F.3d 421, 426 (6th Cir. 1997) (*Feres* doctrine bars derivative suits even when local law gives heirs of the deceased an original action because their claims are entirely derivative of the serviceman's barred claim) (citing cases). Because all remaining claims in this lawsuit are based on injuries sustained by Bamaca in Guatemala, and no primary claim remains viable, as explained above, Plaintiff's derivative claims must be dismissed in their entirety pursuant to *Sosa*.[7]

D. Plaintiff Cannot Resurrect Her Moribund "Access to Courts" Claims and, Even Assuming Arguendo that She Could, Such Claims Would Be Subject to Dismissal

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[7] To the extent that Plaintiff, in her Surreply, raises the possibility that her derivative claims are somehow related to the "Defendants' ongoing false statements to her and to the United States Congress to the effect that defendants possessed no information about her husband", see Pl.'s Surreply at 15, Plaintiff's ever shifting argument is best characterized as a claim for misrepresentation barred against the sole, proper defendant in this case- the United States- under the misrepresentation exception to the FTCA. See 28 U.S.C. § 2680(h).

Finally, in a last ditch effort to save at least some aspect of her case, Plaintiff requests that this Court allow her to resurrect her original claims for violation of her right to access to the courts. *See* Pl.'s Second Am. Compl. PP 166-171 (Count 14); PP 172-177 (Count 15). As noted previously, the Supreme Court in *Christopher v. Harbury* upheld this Court's dismissal of Plaintiff's "denial of access" claims, holding that Plaintiff had failed to identify the underlying cause-of-action that the individual defendants' deception had compromised and for which a remedy was not otherwise currently available. *See* 536 U.S. at 418-22, 122 S. Ct. 2179. Plaintiff takes this ruling to mean that "[s]hould all claims in this case be finally dismissed," she can resurrect this claim and specify precisely which underlying causes-of-action were compromised by any deception. *See* Pl.'s Opp'n at 20-21. Based on this interpretation, Plaintiff asks that she now be granted "leave to amend her complaint" to include allegations that had such deception not occurred, she could have brought a claim for injunctive relief while her husband was still alive against the CIA Defendants; according to Plaintiff, this claim would have been based upon the premise that these defendants, by engaging in torture in violation of the rules and regulations of their agency, had violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* *See* Pl.'s Opp'n at 21.

Two major problems undermine Plaintiff's attempted resurrection of her "denial of access" claims at this time. First, the Supreme Court's decision -- which *dismissed* her "denial of access" claims -- did not "guarantee" that Plaintiff had a right to reinstate her

claims based on a constitutional right to access to the courts in the event that she were unsuccessful on all 28 counts of her Second Amended Complaint -- i.e., the *third* iteration of the complaint in this action. By pointing out that Plaintiff might have possessed causes-of-action otherwise available to her (the very claims now subject to dismissal on this motion), the Court nowhere provided any guarantee that a failure to prevail on those causes-of-action would ensure an opportunity to reinstate her "denial of access" claims. Indeed, the availability of a claim does not guarantee victory on a claim -- a fact that the Supreme Court certainly recognized. Moreover, the Supreme Court itself emphasized its displeasure with the opportunity taken by Plaintiff on appeal and at that late stage in the proceedings to "supply the missing allegations." *See* 536 U.S. at 419 n.17, 122 S. Ct. 2179. Based upon a reading of the Supreme Court's decision, it appears that Plaintiff's attempted resurrection is without foundation.

Second, and more importantly, even assuming *arguendo* that Plaintiff could resurrect her "denial of access" claims based upon a theory that, absent any deception, she could have brought an APA-based action for injunctive relief immediately following her husband's capture, such claims would ultimately be futile. Importantly, Plaintiff -- before the D.C. Circuit and the Supreme Court -- did specify that the individual defendants' deception cost her the opportunity to have brought an action for "the injunctive relief that might have saved her husband's life." *Id.* at 419, 122 S. Ct. 2179. The Supreme Court rejected Plaintiff's "injunctive relief" argument -- the

very argument she now attempts to forward -- in two ways. First, the Court noted:

> It is true that she cannot obtain in any present tort action the order she would have sought before her husband's death, the order that might have saved her husband's life. But neither can she obtain any such order on her access claim, which therefore cannot recompense Harbury for the unique loss she claims as a consequence of her inability to bring an intentional-infliction action earlier.

Id. at 421-422, 122 S. Ct. 2179. It is for this reason -- i.e., that Plaintiff's "available" relief under Counts 18-19, 20-22, and 28 would provide her the same relief that any "denial of access" claim would -- that the Supreme Court dismissed Plaintiff's attempted "backward-looking action." *See id.* at 422, 122 S. Ct. 2179 ("And it is just because the access claim cannot address any injury she has suffered in a way the presently surviving intentional-infliction claims cannot that Harbury is not entitled to maintain the access claim as a substitute, backward-looking action.").

Second, the Supreme Court emphasized that Plaintiff's "denial of access" claim would likely fail for other reasons as well. *See id.* at 422 n.19, 122 S. Ct. 2179. Footnote 19 of the Supreme Court's Opinion focuses on the significant obstacles that Plaintiff would have been forced to overcome had she been able to locate a remedy not otherwise currently available. *See id.* In Footnote 19, the Supreme Court specifically noted one potential

roadblock that is certainly relevant in the context of this motion to dismiss:

> And, of course, all of this assumes the unlikely case that the Government would not certify the defendants' action as exercises of their official capacity, or that if the Government did, an action could be maintained under the Federal Tort Claims Act.

Id. (citations omitted). As discussed throughout this Opinion, the Government did enter a Westfall Certification, the FTCA does apply to Plaintiff's suit, and -- pursuant to *Sosa* -- Plaintiff's claims are now barred. Accordingly, even if the Supreme Court's Opinion could be read to allow Plaintiff to resurrect her "denial of access" claims contained within Counts 14 and 15, Plaintiff's present formulation of the "claims lost" following any deception (1) has already been rejected by the Supreme Court, and (2) would also have to be rejected for the reasons expressed above in this Opinion. As such, the Court rejects Plaintiff's attempted reformulation of her "denial of access" claims at this time, and notes that dismissal of all remaining counts is both complete and final.

IV: CONCLUSION

For the reasons set forth above, the Court shall grant Defendant's Motion to Dismiss and shall dismiss all counts remaining in Plaintiff's action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). An appropriate Order accompanies

4. United States District Court for the District of Columbia, Order, August 1, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER K. HARBURY on her Own Behalf and as administratrix of The Estate of Efrain Bamaca-Velasquez,	§	
Plaintiff,	§	
v.	§	C. A. No. 96-438(CKK)
MICHAEL V. HAYDEN Director of the Central Intelligence Agency, et al.,	§	
Defendants,	§	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 1st day of August, 2006, hereby

ORDERED that [199] Defendant's Motion to Dismiss All Remaining Counts of the Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) is GRANTED; it is further

ORDERED that this case is closed. This is a final, appealable Order.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY

United States District Judge

5. United States District Court, District of Columbia Opinion of March 13, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER K. HARBURY,

Plaintiff.

v. Civil Action No. 96-00438 (CKK)

JOHN M. DEUTCH, *et al.*,

Defendants.

MEMORANDUM OPINION

Some four years after Plaintiff, Jennifer K. Harbury, filed her original Complaint in the above-captioned case, pending before the Court are Defendants' Motion to Dismiss Count 28 of Plaintiff's Second Amended Complaint (alleging violations of international law), and Defendants' Supplemental Motion to Dismiss, with which they seek dismissal of the remainder of Plaintiff's Second Amended Complaint.[1] In two separate memorandum opinions, the Court has described in detail the facts alleged in

[1] Since the filing of this latest round of Motions to Dismiss, the Court of Appeals for the D.C. Circuit affirmed this

Harbury's Complaint as well as the legal claims set forth therein. *See* Mem. Op. filed Mar. 23, 1999 & Mem. Op. filed Mar. 9, 2000.[2] In the latter of the two opinions, the Court noted its concern that Harbury's international law claims may raise nonjusticiable political questions, although the parties had not briefed the issue. Therefore, the Court ordered additional briefing on the applicability or inapplicability of the political question doctrine to Harbury's international law claims; the parties' responses are now before the Court. Because the Court finds that Plaintiff's allegations do not clearly implicate unreviewable issues of national foreign policy, the Court determines that, on the pleadings before it, the political question doctrine does not preclude review of Plaintiff's narrowly construed claims. Accordingly, the Court shall deny Defendants' motion as to Count 28.

Since the Court issued its last Memorandum Opinion in this case, the Attorney General's certification that the individual defendant employees of the United States were acting within the scope of their employment at the time of the incidents alleged in Harbury's Complaint has spawned a new motion to dismiss, and another round of briefing in response thereto. On the record currently before the Court, the Court is able to address only a portion of Defendants' most recent motion. Specifically, the Court has a sufficiently developed factual record to consider and subsequently, to reject Defendants' arguments that the foreign country exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, bar

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[2] The Court hereby incorporates those discussions into this more limited one addressing the parties' most recent filings.

Harbury's claims. However, Defendants' assertion that the FTCA's discretionary function and/or independent contractor exceptions bar Harbury's tort claims raise certain jurisdictional questions which cannot be answered without a more developed factual record. The Court stated as much at a June 29, 2000 hearing when it ordered the parties to engage in limited jurisdictional discovery on these two issues so that a factual record could be developed. Although the Court indicated the rulings specified herein on the record during the June 29, 2000 hearing, it seems prudent to issue a written Memorandum Opinion to ensure that there is no confusion about the basis for and extent of the Court's rulings, and in addition, to ensure that the record of this somewhat complex case remains complete and coherent. Accordingly, as is detailed below, the Court explains its denial Defendants' most recent motion to dismiss and the basis of the order of limited discovery relevant to the discretionary function and independent contractor exceptions.[3]

DISCUSSION

A. The International Law Claims

Harbury names as jurisdictional bases the Alien Tort Claims Act ("ACTA"), 28 U.S.C. § 1350, which confers original jurisdiction on the district courts "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[4] the Torture Victim Protection Act ("TVPA"),

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[3] The Court also notes that since the June 28, 2000, hearing a discovery dispute has arisen, pursuant to which Plaintiff has filed a Motion to Compel. That motion, as well as the government's opposition thereto, will be addressed in a subsequent Memorandum Opinion and/or Order.

[4] In recent years, courts have repeatedly affirmed the notion that, in addition to federal jurisdiction, the Alien Tort Act provides

28 U.S.C. § 1350 note, and 28 U.S.C. § 1331. Signed into law by President George Bush in 1992, the TVPA provides in relevant part:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1)subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a), codified at 28 U.S.C. § 1350 note. In Plaintiff's Submission of a More Detailed Statement Regarding Count 28 of her Complaint, compiled at the Court's behest to clarify the rather general statement contained in her Complaint, Harbury gave a more precise account of the alleged violations. She contends

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plaintiffs with a cause of action "for specific, universal, and obligatory international human rights standards . . . ." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *see also Abebe-Jira v. Newego*, 72 F.3d 844, 848 (11th Cir. 1996) (concluding that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (finding that the ATCA provides a remedy for allegations relating to genocide, war crimes, and official torture); *Xuncax v. Gamajo*, 886 F. Supp. 162, 179 (D. Mass 1995) ("§ 1350 yields both a jurisdictional grant and a private right to sue for tortuous violations of international law . . . without recourse to other law as a source of the cause of action.").

specifically that Defendants engaged in extrajudicial execution; disappearance; torture; prolonged arbitrary detention; cruel, inhuman or degrading treatment, or specific international law problems. *See* Pl.'s More Detailed Stmt. at 2-7.

Certain claims involving foreign relations have been deemed nonjusticiable political questions by United States courts. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), for example, this Circuit held that

> the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'

Id. at 209 (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Political questions derive their nonjusticiability from the constitutional separation of powers among the three branches of the federal government. *See Lamont v. Woods*, 948 F.2d 825, 831 (2d. Cir. 1991) (citing *Powell v. McCormack*, 395 U.S. 486, 518 (1969); *Baker v. Carr*, 369 U.S. 186, 210 (1982). Although the Court has expressed reservations about exercising jurisdiction over Harbury's international law claims, given the prospect of

reviewing Defendants' actions in the context of American foreign policy towards Guatemala, the current record does not, in the Court's estimation, point inexorably in that impermissible direction.

Courts faced with a potentially nonjusticiable political question are guided by a three-pronged inquiry. In *Ramirez de Arrellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir.1984)(en banc), *vacated on other grounds*, 471 U.S. 1113 (1985), the Court of Appeals for the D.C. Circuit enunciated the relevant inquiry: "'(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?'" *Id.* at 1511 (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)).[5] Guided by these three principles, the Court will evaluate whether Harbury's

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[5] The *Baker* Court described the circumstances giving rise to a political question in more elaborate terms.

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

claims run afoul of the political question doctrine and hence, are barred.

The first inquiry undertaken by the Court requires an analysis of whether the text of the Constitution implicitly or explicitly commits the state claim to either the Executive Branch, or the Legislative Branch. *Id.* The quintessential example of such commitment is the "textual commitment of impeachment trials to the Senate." *See Nixon v. United States,* 938 F.2d 239, 245 (D.C. 1941) (citing *Baker*, 369 U.S. at 210).[6] This case, unlike the example from *Baker,* does not appear to turn on the meaning of a single word. Rather, argue Defendants' the Constitution, when viewed as a whole, indicates an intent to commit any and all foreign relations matters to the political branches of the government:

> One need not look far into the Constitution to see some half a dozen references in that Constitution, textual references, to military operations, from the President's role as Commander in Chief to the Congress's role to declare war, to raise and support armies and navies, to provide regulations for the militia. All of those things, all of those textual references add up to a very broad level of deference that the court gives to military operations when it involves U.S. military

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[6] Another example appears in *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989), where the district court found that an action arising out of the downing of an Iranian civilian aircraft by United States Navy missiles was nonjusticiable as a political question, since it targeted Naval decisions constitutionally committed to the President as Commander in Chief. *See id.* at 755.

> and U.S. soldiers under the command of the U.S. military in situations that are governed by textual references in the Constitution and are committed to those other branches.

Transcript of Status Conference, *Harbury v. Deutch, et. al.*, No. 96-438 (D.D.C. June 27, 2000) at 26. However, Defendants have framed Plaintiff's claim too broadly. Harbury explicitly disavows any desire to "challenge the right of the United States to support the government of Guatemala, to conduct intelligence operations there, or to obtain information from opposition forces through the use of paid assets. . . ." Pl.'s Response to Part I of Defs.' Supp. Mot. Dismiss at 3. Rather, she "take[s] issue only with [Defendants'] method of administering that policy. . .," *Lamont*, 948 F.2d at 832, and not the policy itself.

In this regard, Plaintiff has attempted to discredit Defendants' characterization of her claim as the type of "sweeping challenge to the Executive's foreign policy" which is typically nonjusticiable. *Ramirez de Arrellano*, 745 F.2d at 1512. In Harbury's view, her claim seeks to vindicate personal rights—those of her husband to be free from torture and other unlawful acts, and those of herself to be free from intentionally inflicted emotional distress and other injuries by virtue of the wrongs committed against her husband—and thereby to redress a very specific wrong.[7] Thus, as it is presently framed,

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[7] In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the Ninth Circuit wrote eloquently of the profound injury which torture, and particularly state-sanctioned torture, inflicts on the individual and on the body-politic.

Harbury's Complaint "challenges netiher the legitimacy of United States foreign policy towards [Guatemala], nor does it require the court to pronounce who was right and who wrong in [Guatemala]. On the contrary, the complaint is narrowly focused on the lawfulness of the defendants' conduct in a single incident." *Linder v. Portocarrero,* 963 F.2d 332, 337 (11th Cir. 1992) (rejecting a challenge on nonjusticiability grounds to claims against leaders of the Nicaraguan contras for the murder of a U.S. citizen in Nicaragua).

Lamont v. Woods identifes the distinction Harbury attempts to draw as "[t]he crucial distinction between policy and implementation . . . ," *Lamont,* 948 F.2d at 833. This distinction operates to shield certain government actions from judicial review, in particular those of the adjudication of which would entail "broad challenges to the Executive's conducting of foreign relations," *Ramirez de Arrellano,* 745 F.2d at 1512 (en

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Situating the abhorrence for torture at the center of international law, the court explained that

> the right to be free from official torture is fundamental and universal, a right deserving of the highest statute under international law, a norm of *jus cogens.* The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

Id. at 717.

banc). But this distinction also leaves as justiciable specific means of implementing policy. *See Lamont*, 948 F.2d at 832.

Defendants' analysis ignores this distinction, and instead, views a claim involving virtually any an official United States conduct in a foreign country as presenting a nonjusticiable political question.[8] The government's position appears to stem largely from its concern with "the foreign policy implications" which might result from judicial scrutiny of "the U.S.

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[8] The following colloquy illustrates the governments' position:

THE COURT:	So based on what you've said . . . [i]f the CIA takes any conduct, no matter what kind of conduct it is in a foreign country, it is always going to be a political question and can never be – they can never bring a claim. Is that what your position is?
GOVERNMENT:	I think we are coming pretty close to that, Your Honor. I hate to say "never" and "always."
. . .	
THE COURT:	But basically what your position is, then, is your position that the CIA can go into any foreign country, do whatever they want . . . and it will never – you will never be able to bring a claim under these international laws. Is that your position?
GOVERNMENT:	It would be the government's position, I believe, that under those circumstances, the inquiry would have to be made by the political branches and not by the judicial branch adjudicating the correctness of those kinds of decisions.

intelligence community involved in operations in [a particular] foreign country." Transcript of Status Conference, *Harbury v. Deutch, et. al.*, No. 96-438 (D.D.C. June 27, 2000) at 24. While the Court is necessarily concerned about the potential foreign policy implications of judicial intervention, Defendants' absolutist position ignores the guidance of *Baker v. Carr,* which teaches that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker,* 369 U.S. at 211. This case does not call upon the court to declare whether a treaty has been terminated or whether to recognize a foreign country, *see id,* but merely to determine whether a Defendants' acted lawfully in specific actions taken against Harbury's husband, namely "kidnaping, torture, and extrajudicial execution." Pl. Supp. Brief. at 5. Accordingly, it does not appear that the multitude of references to war and foreign policy in the Constitutions suffices to textually commit determination of the tort issue before this Court to one of the political branches of government. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria,* 937 F.2d 44, 49 (2d Cir. 1991).

The second prong of the political question inquiry directs the Court to identify whether there exist "judicially discoverable and manageable standards" according to which the court may consider the question presented. *Baker*, 269 U.S. at 211. Harbury insists that the fact that her claims "arise under international law does not render them unsuitable for resolution." Pl. Supp. Brief at 6. Defendants fail to respond directly to this assertion, merely repeating generalized arguments that the

issues presented by Harbury are too politically intertwined for judicial determination.[9] *See generally,* Def. Supp. Mot. To Dismiss; Def. Response to Pl. Supp. Mem.

While Harbury appropriately relies upon statements by other courts that there exist "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act which obviates any need to make initial policy decision of the kind normally reserved for nonjudicial discretion," *Kadic v. Karadzic,* 70 F.3d 232, 248 (2d Cir. 1995) (citing *Klinghoffer,* 937 F.2d at 49, and *Filartiga v. Pena-Irala,* 630 F.2d 876, 885 (2d. Cir. 1980)), this case is somewhat distinct. Unlike *Kadic,* Harbury's claim potentially involves an inquiry into United States' management and supervision of its own assets in foreign territory, rather than actions taken independently by foreign individuals in foreign territory. Thus, the Court's question becomes whether there exist standards by which the United States, when managing its assets in foreign territory, can be judged.

Though the question may be daunting, it is important to remember that the Court need not

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[9] In more than one instance, Defendant's cite to *Sanchez-Espinoza* for the proposition that the Court should reject Harbury's claims as nonjusticiable because "[t]he foreign affairs implications of suits cannot be ignored." 770 F.2d at 209. Despite the accuracy of this statement, Defendants' reliance upon it in this context is unfounded, as the Court of Appeals, when it made the statement, was discussing the availability of *Bivens* remedies in a particular instance, and had expressly declined to "resort" to the political question doctrine for dealing with the plaintiff's claims. *Id.* at 206.

identify standards by which all governmental conduct in foreign countries shall be judged. All that is required of the Court is to determine whether there exist judicially manageable standards by which the conduct *alleged in this specific case* can be judged. In the instant case, Harbury alleges that United States government participation and complicity in torture and other similarly inhumane actions. *See generally*, Pl.'s More Detailed Stmt. There is no dispute that participation, conspiracy, or even acquiescence to torture and the like is prohibited under international law. *See Siderman de Blake*, 965 F.2d at 717; *accord* Transcript of Status Conference, *Harbury v. Deutch, et. al.*, No. 96-438 (D.D.C. June 27. 2000) at 42. Accordingly, Harbury has merely asked this Court to determine whether the government's actions in this case, through hiring and supervising assets in Guatemala, violate a duty owed to all human beings under the international treaties and laws to which the United States has subscribed. Framed in this manner, the Court concludes that it is not entirely lacking in judicially manageable standards by which participation, conspiracy, and/or acquiescence in torture and other human rights violations, if proven, can be judged.

Lastly, it is appropriate to consider whether prudential considerations counsel against judicial intervention in this matter. In light of the fact that Plaintiff has narrowed her claims to avoid any implication that she seeks judicial monitoring of foreign policy and does not challenge United States relations with any foreign country, the prudential considerations which might weigh against recognizing Harbury's claims are substantially weakened. Most

significantly, the clear prohibition against torture and other human rights violations in international law alleviates the concern that this court will be required to "make initial policy decisions of a kind appropriately reserved for [political] discretion." *Aktepe v. United States,* 105 F.3d 1400, 1404 (11th Cir. 1997). That determination has already been made by the political branches by recognizing and/or entering into customary international law, international agreements, or specific international law provisions. *See generally,* Pl.'s More Detailed Stmt. Thus, there is little risk that this Court's adjudication of Plaintiff's claims will reflect "lack of respect due coordinate branches of the government," B*aker,* 369 U.S. at 217, nor that decision in Plaintiff's favor might create "conflicting pronouncements from the Judiciary and the political branches" regarding the United States foreign policy. *Ramirez de Arrellano,* 745 F.2d at 1513.

Based on the foregoing, the Court concludes that, notwithstanding the potential geopolitical implications of her lawsuit, the Court cannot find that Harbury's discrete challenges to the Defendants' allegedly tortious activities escapes judicial review by virtue of the political question doctrine.

B. The Effect of the Attorney General's certification

Following the certification by the Attorney General that the seventeen individually-sued defendants were acting within the scope of their employment as employees of the United States at the time of the incidents alleged in Harbury's Complaint, *see* Certification signed Mar. 31, 2000 (attached to Defs. Supp. Mot. Dismiss), Defendants have moved to dismiss the remainder of Harbury's Complaint. *See*

Defs.' Supp. Mot. to Dismiss at 8. This certification brought the remaining claims under the aegis of the Federal Tort Claims Act "FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* As Defendants initiate this third round of dispositive motions prior to the commencement of any discovery, the Court finds the factual record too insubstantial to make a determination on Defendants' latest set of arguments for dismissal, which are jurisdictional in nature. Accordingly, the Court has ordered limited discovery into jurisdictional facts so that the record can be sufficiently developed to make a reasoned decision.

Defendants argue that, with the substation of the United States as Defendant, Harbury's action is untimely under 28 U.S.C. § 2401(b) (requiring a plaintiff to file her Federal Tort Claims action within six months of the denial of her administrative tort claim). *See* Defs.' Supp. Mot. to Dismiss at 8. In the alternative, they contend that sovereign immunity bars her remaining claims pursuant to the discretionary function, foreign country, and independent contractor exceptions to the FTCA. *See id.*[10]

Section 2401(b) of the FTCA provides that "[a] tort claim against the United states shall be forever barred unless it is presented in writing to the appropriate federal agency with two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by

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[10] Defendants also argue, albeit cursorily, that Harbury's intentional tort claims are barred under the FTCA. See Defs.' Supp. Mot. to Dismiss at 14.

the agency to which it was presented." 28 U.S.C. § 2401(b). Since the CIA denied Harbury's administrative claim in September of 1996, Defendants maintain that the Court lacks jurisdiction over her tort claims against the United States. *See* Defs. Supp. Mot to Dismiss at 9. The Court disagrees. Under section 2679(d)(1), once the Attorney General certifies that the employees were acting within the scope of their employment, an event that transpired in the instant case less that three months ago (and almost four years after Harbury filed her original Complaint), the action is deemed to be one against the United States. So that the government cannot "sandbag' a plaintiff by waiting to certify the action until after the limitations period. . . ," *Staple v. United States,* 740 F. 2d 766, 769 (citing *McGowan v. Williams,* 623 F.2d 1239 (7th Cir. 1980)), courts have held that the substitution of the United States, either by amendment of the complaint or by certification under § 2679(d)(1), allows a relation back to the original Complaint. *See McGuckin v. United States,* 918 F. 2d 811, 812-13 (9th Cir. 1990) (holding that a second amended complaint, properly served, naming the United States as the proper party related back to the original complaints under Fed. R. Civ. P. 15(c)); *Allgeier v. United States,* 909 F. 2d 869, 873 (6th Cir. 1990) (same); *Ezenwa v. Gallen,* 906 F. Supp. 978, 985 (M.D. Pa. 1995) (applying the relation-back rule of Rule 15(c) by analogy to the notice of substation under § 2679(d)(1)).

Accordingly, the Attorney General's recent certification not only obviates any need for Plaintiff to amend her Complaint to add the United States as Defendant, it also prevents her claims from being time barred under the FTCA. "Since the proper parties were

provided notice of the claims, and knew or should have known, through the operations of the FTCA, that the United States was the proper party defendant, the effective date for satisfying the limitations requirement was the date of service of the complaint on the U.S. Attorney and the Attorney General." *Ezenwa*, 906 F. Supp. at 985. Because no prejudice to Defendants has resulted from the Attorney General's decision to wait several years into this litigation to certify that the Defendants were "acting within the scope of [their] office or employment at the time of the incident out of which the claim arose. . . ," 28 U.S.C. 2678(d)(1), Harbury's claims are not time-barred.

Defendants' arguments regarding the discretionary function and independent contractor exceptions to the FTCA, however, raise jurisdictional questions for which the answers are partly factual in nature. The FTCA is a limited waiver of sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 813 (1976). Thus, when certain actions or individuals are excluded from the coverage of the Act, there is no waiver of sovereign immunity which permits courts to exercise jurisdiction over the normally immune United States government.

The discretionary function exception preserves the sovereign immunity of the United States in "[a]ny claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In the words of the Supreme Court, this exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to

protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Covering "only acts that are discretionary in nature acts that 'involve an element of judgment or choice. . . ,'" *Gaubert v. United States*, 499 U.S. 315, 322 (1991) (quoting *Berkowitz v. United States*, 486 U.S. 531, 536 (1988)), the exception specifically protects "governmental actions and decisions based on considerations of public policy." *Id.* at 323 (quoting *Berkowitz*, 486 U.S. at 537).

In order to determine whether the acts at issue here fall under this exception, then, the Court must ascertain first whether the Defendants enjoyed the discretion to engage in the conduct alleged in Harbury's Complaint. The description of Defendants' alleged actions contained in Harbury's Complaint remains, by necessity, too general without further investigation to determine under what precise authority or with what element of judgment they took place. Thus, "whether the acts for which liability is here claimed were so fraught with foreign relations or other public policy considerations as to render them 'discretionary' within the meaning of the FTCA cannot be summarily determined on this record." *Sami v. United States*, 617 F. 2d 755, 767 (D.C. Cir. 1979). "The Federal Rules of Civil Procedure generally provide for liberal discovery to establish jurisdictional facts." *Goldman Holdings v. Rafidain Bank*, 26 F. 3d 1143, 1147 (D.C. Cir. 1994) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 & n. 13 (1978); *Crane v. Carr*, 814 F. 2d 758, 760 (D.C. Cir. 1987); *Naartex Consulting Corp. v. Watt*, 722 F. 2d 779, 788 (D.C. CIR. 1983)). Accordingly, the Court has ordered order limited discovery into the

circumstances surrounding the acts challenged here with respect to the discretionary function exception.

Like the discretionary function exception, whether the independent contractor exception bars Harbury's claims under the FTCA cannot be determined absent further factual development. Contending that Harbury's claims target the actions of CIA hired assets, Defendants emphasize that these actors were not federal employees, but independent contractors. *See* Defs. Supp. Mot. Dismiss at 17-19. Whereas the Act does exclude from its definition of covered "employees" "any contractor with the United States," 28 U.S.C. § 2671, Harbury challenges the actions of federal employees in contributing to the alleged torts, not merely tortious actions by Guatemalan military officers. *See, e.g.*, Am. Compl. ¶¶ 197-201, 205. Thus, Harbury's claim incorporates both the actions of individuals in Guatemala and the allegedly tortious hiring and direction of those individuals by the United States.

The applicability of the independent contractor exception to either framing of Harbury's claim is unclear. Contrary to Defendants' argument, the mere fact that an independent contractor played a role in some allegedly tortious actions does not necessarily mean that any FTCA suits related thereto is barred by the independent contractor exception. *See, e.g., Logue v. United States,* 412 U.S. 521, 532-33 (1973) (vacating and remanded a judgment to the lower court to determine whether the negligence of government employee, rather than merely the negligence of an independent contractor, caused the alleged injuries); *Tisdale v. United States,* 62 F. 3d 1367, 1373 (11th Cir. 1995) ("Although the [FTCA] precludes federal liability

for the torts of an independent contractor,. . . the employment of an independent contractor does not necessarily insulate the United States from liability for its own employees' independent acts of negligence which occur in connection with the work of an independent contractor.") (quoting *Berman v. United States,* 572 F. Supp. 1486, 1491 (N.D.Ga. 1983) (quotations omitted) (alterations in original); *Orlikow v. United States,* 682 F. Supp. 77, 87 (D.D.C. 1988) ("Where the government negligently selects a third party to carry out its policy there is a duty to do so reasonably,")(citing *Melton v. United States,* 488 F. Supp. 1066, 1072 (D.D.C. 1980)). Moreover, the Supreme Court has indicated that the determination of "independent contractor" status under the FTCA is not a bright-line determination which can be ascertained according to whether the tortious actor is formally designated as an "employee." In *United States v. Orleans,* 425 U.S. 807, 813 (1976), the Supreme Court indicated that it is "critical" for courts to determine the "power of the Federal Government to control the detailed physical performance of the contractor" in "distinguishing an agency from a contractor." The facts before the Court do not evaluate the degree of control exercised over the assets in Guatemala, nor do they indicate the degree of direct involvement by United States employees. Therefore, the Court cannot say whether the independent contractor exception bars Harbury's claims against the United States for the actions of its employees and/or the assets. In order to make that determination, the Court requires further factual development.

Defendants' third argument that Harbury's claims are barred by the foreign country exception, is

not borne out by the record currently before the Court. While the FTCA preserves the United States's immunity for "any claim arising in a foreign country," 28 U.S.C. § 2680(k), the United States enjoys no exemption from liability "for acts or omissions occurring here which have their operative effect in another country." *Sami*, 617 F. 2d at 762. Accordingly, to the extent Harbury alleges tortious acts which occurred in the United States, though their effect might have been felt in Guatemala, these are not covered by the foreign country exemption.[55]

CONCLUSION

Upon careful review of the briefs submitted by the parties and the applicable law, the Court has determined that, on the facts presently before it, the political question doctrine does not preclude the Court's review of Harbury's claims for violations of international law. Moreover, the Court finds that, nonwithstanding the recent substitution of the United States as Defendant several years after the commencement of this action and Harbury's receipt of the letter denying her administrative tort claim, Harbury's claims are not time-barred under 28 U.S.C. § 2401(b). This recent certification, and the substitution to which it gave rise, related back to her original Complaint to render her claims timely. Finally, the Court has considered Defendants' arguments regarding the applicability of the foreign country exception to the FTCA, and has determined that these exceptions do not divest the Court

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[55] Of course, neither are those acts occurring here which she alleges took effect here, such as the acts allegedly occasioning in her intentional infliction of emotional distress.

of jurisdiction under the facts before it. Before it can make decisions on the discretionary function exception and the independent contractor exception, though, the Court will need a more developed factual record. An appropriate Order accompanies this Memorandum Opinion.

March ___, 2001.

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COLLEEN KOLLAR-KOTELLY

United States District Judge

6. United States District Court, District of Columbia, Order of March 13, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER K. HARBURY,

Plaintiff.

v. Civil Action No. 96-00438 (CKK)

JOHN M. DEUTCH, *et al.*,

Defendants.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion, Defendants' Motion to Dismiss Count 28 of Plaintiff's Second Amended Complaint shall be denied. Accordingly, it is, this ___ of March, 2001, hereby

ORDERED that Defendants' Motion to Dismiss Count 28 is DENIED in part as neither the political question doctrine nor the limitations period in 28 U.S.C. § 2401(b) bar Plaintiff's claims; and it is further

ORDERED that Defendants' Motion to Dismiss Count 28 is DENIED in part as the foreign country

exception to the Federal Tort Claims Act does not apply to Plaintiff's claims; and it is further

ORDERED that Defendants' Motion to Dismiss count 28 is DENIED WITHOUT PREJUDICE as to the application of the independent contractor and discretionary function exceptions to the Federal Tort Claims Act.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

7. Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-2680, Pub. L. No. 79-601, Title IV, 60 Stat. 812, 842-47 (1946)

28 U.S.C. § 1346

§1346. United Statesas defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS § 607(g)(1)609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine

Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 [28 USCS § 6226,6228(a), 7426, or 7428] (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §6226, 6228(a), 7426, 7428, 7429

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179 [28 USCS §§ 3901 et seq.], the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title [3 USCS §§ 401 et seq].

28 U.S.C. § 2671

§2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title [28 USCS §§ 1346(b) and 2401(b)], the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and

corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32 [32 USCS § 115, 316, 502, 503, 504, or 505], and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006 A of title 18 18 USCS §3006A].

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32 [32 USCS § 101(3)], means acting in line of duty.

28 U.S.C. § 2672

§2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property

or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $ 25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5 [5 USCS §§ 571 et seq.], to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $ 2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $ 2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title [28 USCS § 2677] shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§2671 et seq.].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2673

§2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title [28 USCS § 2672, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

28 U.S.C. § 2674

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu there of.

With respect to any claim under this chapter [28 USCS §§ 2671et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee

Valley Authority is entitled under this chapter [28 USCS §§ 2671 et seq.].

28 U.S.C. § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter claim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676.

§2676. Judgment as bar

The judgment in an action under section 1346(b) of this title [28 USCS § 1346(b) shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2677

§2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title [28 USCS § 1346(b)], after the commencement of an action thereon.

28 U.S.C. § 2678

§2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title [28 USCS § 1346(b)] or any settlement made pursuant to section 2677 of this title [28 USCS § 2677], or in excess of 20 per centum of any award,

compromise, or settlement made pursuant to section 2672 of this title [28 USCS §2672].

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $ 2,000 or imprisoned not more than one year, or both.

28 U.S.C. §2679

§2679.Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when

the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place

in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title [28 USCS § 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title [28 USCS § 2675(a)], such a claim shall be deemed to be timely presented under section 2401(b) of this title [28 USCS §2401(b)] if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 [28 USCS § 2677], and with the same effect.

28 U.S.C. § 2680

§2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 [46 USCS §§ 30901 et seq. or 31101 et seq.] relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g)[Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is

empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

8. "WESTFALL ACT":

Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679, Pub. L. No. 100-694, 102 Stat. 4563 (1988).

§2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be

removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure.In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title [28 USCS § 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title [28 USCS § 2675(a)], such a claim shall be deemed to be timely presented under section 2401(b) of this title [28 USCS §2401(b)]if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced,and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 [28 USCS § 2677, and with the same effect.